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with the author's profound r.

TAGORE LAW LECTURES, 1916.

THE LAW OF MONOPOLIES IN BRITISH INDIA.

BY

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WITH A FOREWORD BY

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TO THE MEMORY OF
MY FATHER,
PROSUNNO COOMAR SEN,
WHOSE LIFE OF FAITH, COURAGE AND FIERY
ENTHUSIASM HAS BEEN TO ME A PER-
ENNIAL SOURCE OF STRENGTH IN
ALL MY STRIVINGS.

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PREFACE.

I OWE the University and the general public an apology for the delay which has unavoidably occurred in the publication of these lectures. They were delivered in the year 1916. In order, therefore, to bring them up to date later cases of consequence, specially on the law of patents, copyright, trademarks and restraints of trade, have been incorporated in them. To make the lectures on the law of patents and copyright more serviceable to the student and the practitioner the Indian Patents and Designs Act of 1911, the Patents and Designs (Temporary Rules) Act of 1915, and the Indian Patents and Designs Rules of 1912, have been added as appendix to lecture V ; and the Indian Copyright Act of 1914 and the Indian Copyright Regulations of 1914, have been added as appendix to lecture VI.

To the Honourable Sir Dawson Miller, Kt., K.C., Chief Justice of the Patna High Court, I cannot sufficiently express my gratitude for kindly contributing the Foreword which introduces this volume. Considering that his Lordship's time is so preoccupied by the duties of his high office I cannot help feeling greatly indebted to him for this act of kindness on his part.

I have acknowledged my obligations individually to the authors whose works I have constantly drawn upon. But I wish again to express my acknowledgements to them for the help I have derived from their works in the preparation of these lectures.

I deeply deplore the sudden death of my friend Babu Panchanan Banerjee, M.A., B.L., Vakil of the Patna High Court, who was cut off in the prime of his life when this work was only half-way through the press. But for his ungrudging assistance it would hardly have been possible for me to get the lectures ready for the press. To him I owe a debt of obligation for bringing the case-law up to date in lectures V-IX.

I desire to express my sense of indebtedness to Mr. S. N. Datta, Barrister-at-Law and Advocate of the Patna High Court, for his unfailing kindness and co-operation in the preparation of this volume. He has not only helped me in preparing lecture X for the press and bringing the case-law therein up to date, but has taken the entire responsibility of preparing the General Index and the Index of Cases, which have considerably added to the usefulness of the book.

I also desire to express my thanks to Mr. S. N. Sahay, B.A. (Oxon), Barrister-at-Law and Advocate of the Patna High Court, for rendering me active assistance in the preparation of lectures III and IV for the press.

BAYLEY ROAD,
PATNA.

P. K. SEN.

The 15th June, 1922.

FOREWORD.

THE law of monopolies is probably one of the least studied of the various branches of jurisprudence. To the majority of people it is perhaps no exaggeration to say that it is almost a closed book, and yet, as is pointed out at the beginning of these lectures, in one sense the secret of success in all competition and all economic activity consists in availing oneself of monopolistic advantages. The business mind is no doubt imbued with the importance of such advantages and instinctively strives in a multitude of ways to secure them, but the law relating to monopolies is probably a subject which the average man of business regards merely as the dry bones of legislation locked up somewhere in the law's lumber rooms. Nevertheless, the history of the subject is full of human interest. It is also one of great antiquity and reminds us of the proverb that there is nothing new under the sun. Many of its features as it exists at the present day can be recognised amongst the early laws of primitive communities. The great modern capitalistic monopolies known as trusts or combines, which now spread their tentacles over the face of the globe and which are looked at askance by the State, find their prototype in the most ancient times. The combination of traders for the purpose of putting up prices beyond those fixed by the State was, as the author reminds us, known in the days of Manu and the repressive measures in force to suppress the practice find mention in the Mitakshara. In ancient Greece the machinations of the corn factors, who took advantage of national calamities to form what would nowadays be called a corner in wheat and so increase their wealth at the expense of the public, incurred the severe strictures of Lycias the orator whose caustic comments might almost have been intended to touch the conscience of the so-called "profiteer" of our own times.

The subject must be regarded from two aspects, the legal and the economic. The object of legislation is to assist the economic value of monopolies by controlling and directing their exercise within certain channels best calculated to combine the welfare of commercial enterprise with the interests of the public. At the present day the most important branch of the law on the subject is that which deals with patents and their cousins copyright and trade marks. The Indian patent law is founded upon that now obtaining in England, and it is instructive to trace its history from early times to its present state of development. It forms an interesting chapter in the struggle between the Crown and Parliament. Monopolies were always part of the royal prerogative and were originally exercised only by the sovereign power. The granting of these privileges to subjects as a mark of royal favour or as a means of augmenting the private revenue of the Sovereign was of later growth. In England the first recorded case in the patent rolls appears in the time of Edward III but during the reign of the Plantagenets comparatively few cases are recorded. The abuse of this practice only became notorious under the Tudor Monarchs and was continued by the first of the Stuarts. It was always keenly resented by Parliament and the common law lawyers. Such grants, they maintained, were contrary to the spirit of Magna Charta and against the ancient and fundamental laws of the realm and the liberties of the subject. The abuse received its death warrant by the passing of the Statute of Monopolies in 1623. This was not achieved however without a severe struggle. Heated debates had taken place in the House of Commons in Queen Elizabeth's reign, notably in 1565 and again in 1601, and, although the tact of Elizabeth lead her to give way to popular feeling, the evil was revived in the reign of James I. Under that Monarch in spite of the decision in *Darcy v. Allein* in 1602 which declares monopolies, except in the case of new inventions, to be against the common law, and notwithstanding the renunciation of Elizabeth, the abuse of the royal prerogative in granting patents of monopolies attained

inordinate proportions. Public feeling ran high. Many such grants were cancelled by the Committee of grievances appointed by Parliament and presided over by Sir Edward Coke, and some of the more notorious of the monopolists fled the country rather than face a trial. Finally about two years before James' death the Statute of Monopolies was passed. Although Charles I revived the objectionable practice the law on the subject was definitely declared by the Act of 1623. Since then many Acts have been passed the most important of which are that of 1883 (46 and 47 Vict. c. 57), which repealed previous enactments, and the Patents and Designs Act, 1907, but it is upon the exception contained in the Statute of Monopolies that the whole law of patents in favour of new inventions is up to the present time based.

It is interesting to note that the arguments put forward in favour of granting monopolies from the time of Elizabeth were based upon the same principle as those which were urged against them, namely, the public interest. Paradoxical as this may appear it cannot lightly be brushed aside as a piece of sophistical reasoning. In this work-a-day world the true doctrine is frequently found to lie in a compromise which is arrived at by the recognition that few great truths are subject to no exceptions. Just as it is in the public interest that all citizens should have the right to follow any trade or profession they choose without restraint or hindrance, so also public policy recognises that new and useful inventions tending to the expansion of trade, the saving of labour, the cheapening of commodities, the simplification of mechanical processes and so on should be encouraged. To encourage such inventive genius within reasonable limits without interfering with existing rights is the object of the present patent law. This policy was recognised even in the time of Queen Elizabeth in the case of *Darcy v. Allein*, that great landmark in the history of monopolies, and it was incorporated later in the Statute of Monopolies. Although that Statute declared void all

monopolies as being grievous and inconvenient to the subjects of the realm, an exception was made in favour of all those granted by Parliament or such as were in respect of new manufactures and inventions. How far the present law relating to this subject expresses the true public policy and strikes the proper balance between the claims of inventors and the rights of the public a study of these lectures will assist the reader to determine.

PATNA,
June 1922.

DAWSON MILLER.

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CORRIGENDA.

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| Page 23, footnote, line 7, for "Zoog " | read " Loog " |
| „ 49, line 11, for " to " | read " from " |
| „ 52, line 4, after " met with " | insert " but " |
| „ 52 last line but one, for " horse " | read " horses " |
| „ 210, line 18, after " publishes it." | insert " it " |
| „ 383, footnote, after " Ed IV " | insert " C. 6." |

The Law of Monopolies.

INTRODUCTORY.

Monopoly is primarily a phenomenon of Economics—a result of social, industrial and economic conditions. The underlying idea of monopoly must, therefore, be sought in the science of political economy. Literally, the word denotes sale by one man, from *monos* (alone) and *polein* (to sell). *Monopolia*, in Greek, means exclusive sale by one man, and *monopolion*, the exclusive right or power of sale. But although, originally, 'monopoly' means to sell and not buy or produce, it came to be used in the English language to cover buying and producing as well as selling.¹ The term is now extended to denote production, sale, or purchase, either by one man or by a group acting as one man.

Monopoly—primarily, an economic phenomenon.

Thus, monopoly seems to represent a condition which is inconsistent with unrestricted sale or purchase by every member of society; in other words, of open and free competition.² If in regard to any particular commodity, every man enjoys perfect freedom in producing, purchasing or selling any quantity or quality of it at pleasure, we have a state of affairs which is considered to be the direct opposite of monopoly.³ Under such conditions the state of the market is determined by a mutual adjustment of demand and supply. Economists have discussed at

It is opposed to free competition.

Under free competition the market is governed by a mutual adjustment of demand and supply.

¹ The term "Monopol" in German is employed to cover both selling and manufacturing.

² Competition has been defined as "the act of seeking, or endeavouring to gain, what another is endeavouring to gain at the same time; common contest or striving for the same object."—Century Dictionary.

³ Monopoly is "the abuse of free commerce, by which one or more individuals have procured the advantage of selling all of a particular kind of merchandise"—*Herriman v. Menzies*, 115 Cal. 16, 21; 45 Pac. 730; 35 L.R.A. 318; 56 A.S.R. 81.

Equilibrium of
Demand and
Supply

length the characteristics of such a condition. The fundamental idea in which they all agree is embodied in the so-called doctrine of the Equilibrium of Demand and Supply. Into the diverse ramifications of this doctrine it is beyond the scope of the present lecture to enter. Whether free-trade or protection,¹ whether *laissez faire* or non-intervention, on the one hand, or state intervention, on the other, should claim our adherence as sound economic maxims, we shall have occasion to discuss later on in its proper place. Suffice it to say for the present that monopoly *generally* represents a set of conditions inconsistent with free and open competition and with *laissez faire*, as ordinarily understood.²

The notion of
monopoly requires
careful analysis.

The above is at best a negative way of characterising monopoly. In order properly to understand the notion of monopoly it is necessary to analyse it carefully and bring out its constituent elements. Different economists have emphasised one or other of these constituents, and their treatment of the subject is imbedded in a mass of details, peculiar to the science of political economy, which are of remote concern to a lecture dealing mainly with the legal aspect of it. It is only, however, when these fundamental factors that go to make a monopoly are gathered up and synthesised from the standpoint of law that the full significance of monopoly for our purposes may be appreciated.

Monopolies have been roughly classified as follows³ :—

- (1) Natural Monopolies, arising from favourable natural arrangements of soil or situation, or special ability, aptitude and the like (see § 1).

¹ These antithetic terms are no doubt usually employed with reference to the question of tariff or duties for the regulation of international trade. But, in a broader sense, they are also used to indicate the presence or absence of any form of restraint on the economic activities of individuals—a subject which comes directly under monopolies.

² I have to speak with reservation, as it will be found later on that, in the case of combinations or capitalistic monopolies, which are comparatively a recent growth, the conditions are reversed, the principle of *laissez faire* or non-intervention being invoked on behalf of such monopolies themselves, and state control being deprecated by them as being destructive of their freedom of action. (See § 5 *post*).

³ For a fuller classification see Lecture II.

- (2) Legal Monopolies, deriving their origin from express grant or authority or from the direct sanction of common law or statute. These include patents, copyrights, trade-marks, etc. (see § 4).
- (3) Capitalistic Monopolies, otherwise known as Trusts and Combines which are the outcome of the acts of an individual or individuals—in other words, the outcome of the social will, or of social, industrial and economic conditions, and independent of express grant or authority (see § 5).
- (4) Governmental and Municipal Monopolies. These really come under the second class. But they are treated separately for reasons indicated later (see Lecture II).

With the above rough classification before us, let us proceed to analyse the notion of monopoly.

ANALYSIS OF THE NOTION OF MONOPOLY.

§ I. DIFFERENTIAL ADVANTAGE—*An Essential Basis of Monopoly.*

One of the fundamental ideas which go to make up the notion of monopoly is the idea of differential advantage, or difference of return to equal effort. Differential advantage—a test of monopoly. As an economic phenomenon, it appears in diverse forms, and its value has been estimated differently by different economists. It may be said that there are few commodities of which the production or distribution has not, at some stage or other, been assisted by special or differential advantages of soil or situation, by peculiar talent or aptitude on the part of the producer or seller, or by special processes (of manufacture and the like) not accessible to the rest of its producers. Thus in one sense the secret of success in all competition, and all economic activity, is to avail oneself of such advantages. Taken in this sense, monopoly would seem to cover the whole field of economic activity. At the same time, it is well recognized that in some cases of purchase, production, or sale, such special advantages attain a predominance which justifies their being regarded as a class by themselves. Take, for example, the case of the so-called 'natural monopolies,' such as railways, canals, tramways and other local rapid-transit agencies; the supply of gas, water or electricity—some of them local or municipal monopolies; the supply of coal or other mineral, available only from a particular local area, and so on. In these cases, the monopoly obviously arises from inherent natural advantages. Two tramways cannot run down one and the same street, two railways cannot run through the same area, two plants for the supply of gas, water, or electricity cannot exist within the same town, without involving a ruinous waste of resources due to such competition. Therefore, the individual or the company first in the field must necessarily enjoy the

monopoly. So, if there be a fund of latent power locked up in some creation of Nature such as the Niagara Falls in America, or the Cauvery Falls in Southern India, anybody having the privilege of utilising such power will have a monopoly based upon the inherent properties of the water-fall. The above illustrations, all drawn from amongst natural monopolies, show clearly what a pre-eminent part differential advantage plays in them. But it is not present in natural monopolies alone. In all the different types of monopoly, it is an essential and invariable element. Consider one or two homely illustrations. Let two men of equal capacity and with equal resources cultivate two plots of land of unequal fertility. The result would naturally be that the happy possessor of the more fertile soil would succeed and drive the other to the wall—he would enjoy a monopoly. Again let two men of unequal intellectual capacity be employed in the same department of activity. The one having superior intellect would, of course, succeed and might ultimately drive the other out of the field. In other words, he would enjoy a monopoly. In the former case, the differential advantage is physical, in the latter psychical. But the principle is the same in both, viz. that *production assisted by natural qualities or special facilities gives more valuable results than production not so assisted*. Thus the fundamental notion of monopoly is present in both. One of the greatest economists of the English Classical School says while dealing with monopoly: “Now it is clear that the production in which no appropriated natural agent has concurred is the only production which has been made under circumstances of perfectly equal competition. And how few are the commodities of which the production has in no stage been assisted by peculiar advantages of soil or situation, or by extraordinary talent of body or mind, or by processes generally unknown or protected by law from imitation? Where the assistance of these agents, to which we have given the general name of natural agents, has been obtained, the result is more valuable than the result of equal labour and abstinence unassisted by similar aids. A commodity thus produced is called the subject of a monopoly,

and the person who has appropriated such a natural agent a monopolist.”¹

§ 2. LIMITATION—*A Basis of Monopoly.*

The second point which has to be observed is that an article which is the object of a monopoly is limited in quantity. This is a separate and independent idea going to the concept of monopoly and, therefore, requires independent treatment. Prof. Marshall, in his own inimitable fashion, gives a very happy illustration of this idea. “Suppose,” he says, “that a meteoric shower of a few thousand stones as hard as diamonds, but very large, fell all in one place; so that they were all picked up at once and no amount of search could find any more. These stones, able to cut the hardest metal, would revolutionize many branches of industry, and the owners of them would have a differential advantage in production that would afford a large producer’s surplus.”² It will be observed that the significance of the illustration is that the quantity or number of the meteoric stones in question is limited and cannot be increased. Take, again, the case of the legendary Indian King who while out hunting lost his way in the forest and was almost dying of thirst when he suddenly met a man with a cupful of water. The proud possessor of the cup of water was in every sense a monopolist and could fix his own price, for no more water was to be had for love or money. Thus *limitation in the quantity of the commodity is an ingredient in the concept of monopoly, although every case of limitation is not a case of monopoly.*

§ 3. EXCLUSIVENESS—*A Basis of Monopoly.*

Exclusiveness is one of the underlying ideas making up the notion of monopoly. It is, in fact, implied in the idea of limitation above discussed; and the illustration chosen by Prof. Marshall seeks to express this kindred idea equally well. The meteoric stones are *picked up all at once and become the*

Exclusiveness is another test of a monopoly—but this idea is more or less implied in the idea of limitation.

¹ William Nassau Senior’s ‘Political Economy.’

² Marshall’s ‘Principles of Political Economy.’

exclusive possession of a few. Hence the monopoly. Where, again, the number of sellers is limited to a class or where a commodity is the special and peculiar product of a limited area, there must be a monopoly. It is in this sense that Adam Smith speaks of the "monopoly of the colonial trade," and Cairnes and Prof. Bastable of a "country having the monopoly of an article" (although the traders in the privileged country are not supposed to be in combination). So Mill speaks of the "natural monopoly of skilled labourers."

Monopoly looked at from this point of view means *an exclusive privilege or the possession or assumption of anything to the exclusion of other possessors.*¹ This is a most essential idea and has been emphasised from very olden times. Thus Lord Coke describes monopoly as "a power granted to any person or persons, bodies politic or corporate, for the *sole* buying, selling, making, working or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade."² Blackstone, following soon after, adopts Coke's definition and observes: "Monopolies are much the same offences in other branches of trade that engrossing is in provisions, being a license or privilege allowed by the King for the *sole* buying or selling, making, working or using of anything whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before."³ Recent rulings of American Courts bring out this point of exclusiveness as a test of monopoly with great force and vividness. The following is an instructive specimen: "A monopoly exists where all or so nearly all of an article of trade or commerce within a community or district is brought within the hands of one man or one set of

Lord Coke's
definition adopts
this view.

Blackstone.

Rulings of
American
Courts.

¹ "The possession or the assumption of anything to the exclusion of other possessors; thus a man is popularly said to have a monopoly of any business of which he has acquired complete control"—Century Dictionary. Quoted in *Continental Securities Co. v. Interborough Rapid Transit Co.* (U.S.C.C.), 165, Fed. 945, 956. The definition is quoted in various other cases in America. (See Joyce on Monopolies, § 8, note 28).

² Coke 3 Inst. 181.

³ Blackstone's Commentaries Book IV, p. 159.

men, as to practically bring the handling or production of the commodity or thing within such *single control* to the exclusion of competition or free traffic therein. Anything less than this is not a monopoly."¹ Such single control as is referred to above may be brought about by various sets of circumstances. *Firstly*, it may be determined by the very nature of the commodity itself and natural or physical conditions governing its production, in which case it is rightly designated a 'natural' monopoly (see § 1 *ante*). *Secondly*, it may be brought about by Trusts, Kartells or Combinations, by the use of methods which will be discussed later in § 5. *Thirdly*, one of the time-honoured ways of bringing the production, handling or sale of a commodity within the exclusive control of one man or body of men is by express grant or concession from the Sovereign, or some high public authority. A monopoly so created is usually called a 'legal monopoly.' This leads us to the next feature of a monopoly.

How exclusive control is brought about

(i) By circumstances determined by properties inherent in the business itself.

(ii) By combination—a comparatively recent growth.

(iii) By express grant or authority.

§ 4. EXPRESS GRANT OR AUTHORITY—*A Basis of Monopoly.*

One of the time-honoured ways of creating a monopoly is by express grant or authority. It must be observed at the outset that this feature is not common to all monopolies. It is, however, the characteristic of the oldest monopolies and certain others that have also come down from fairly olden times, such as the exclusive right obtained by royal patent, the copyright of an author or artist, the right to the use of a trademark. These rights, to be discussed presently, go under the name of 'legal monopolies.' There are some who hold the view that the term 'monopoly' ought, in strictness, to be applied to these alone, and should be denied to that modern phenomenon

¹ *Herriman v. Menzies*, 115 Cal. 16, 20, Supreme Court; 46 Pac. Rep. 730 (1896). Quoted by F. H. Cooke in his 'Law of Combinations Monopolies and Labour Unions,' 2nd edition, p. 215, "Monopoly implies an exclusive right, from which all others are debarred, and to which they are subversive"—*United States Chemical Co. v. Provident Chemical Co.*, 64 Fed. 946, 950, citing Green's case, 52 Fed. 104. "But what is a monopoly, as understood in law? It is an exclusive right, granted to a few, of something which was before of common right"—*Charles River Bridge v. Warren Bridge*, 11 Pet. (36 U.S.) 420, 607; 9 L. Ed. 773, *per Mr. Justice Story*.

of monopolistic combination, whereby previously competing businesses are centralised or concentrated so as to bring the whole market in respect of a particular commodity within the single control of a person or combination.¹ This appears to be a very narrow view. Equally narrow is the view of those who go to the opposite extreme and restrict the term monopoly to the modern combination alone, to the exclusion of the so-called legal monopolies.

MONOPOLY AGAINST THE SPIRIT OF ENGLISH LAW.

The conflict between the King and people of England in regard to monopolies arose mainly in connection with the so-called legal monopolies. As a result of such conflicts at various epochs emerged the doctrine that monopolies were against the spirit of English law. To begin with, monopoly is against the spirit and provisions of the Magna Charta: *Aut dissaisietur de libero tenemento suo vel libertatibus, vel liberis consuetudinibus suis* etc., in other words, no man shall be dispossessed of his freehold, that is, land or livelihood, or of his liberties or free customs, that is, of such franchises or free customs as belong to him of his birthright. The word liberties has various significations, as the laws of the realm, franchises and privileges bestowed by the King, and the natural freedom possessed by the subject of England; and as being opposed to this last, monopolies are contrary to the Great Charter.²

The theory of English common law has always been that every individual must be left absolutely free to choose and carry on what calling he likes, and to develop whatever sort of skill may be adequate to such calling. He must be able to earn an honest living by any lawful employment, and for that purpose he must be left perfectly free. This general right to freedom in the choice and conduct of trade was steadily maintained by pre-Elizabethan Judges.³ The

¹ *Vide* Lectures XI, XII.

² See Taswell-Langmead's *English Constitutional History*, p. 138; also Coke's *Second Institutes*, Vol. i, pp. 1-77, and Thomson's *Magna Charta* referred to in Taswell-Langmead.

³ A striking note of dissent is to be found in the utterance of Chief Justice Sir James Ley who observes: "For that God, at the original crea-

social and economic fabric which this theory of freedom has built up is that of free competition which has been called "the life-blood of commerce." Anything calculated to place fetters upon free competition is void at common law. It is on this ground that Lord Coke after having defined monopoly in the above manner (*vide* § 3 *ante*) observes: "That monopolies are against the ancient and fundamental laws of the realm and that the monopolist was in times past, and is much more now, punishable for obtaining and procuring of them, we will demonstrate by reason and prove it by authority"; and then he proceeds to throw his argument into the form of a syllogism thus: "Whatsoever offence is contrary to the ancient and fundamental laws of the realm, is punishable by law; but the use of a monopoly is contrary to the ancient and fundamental laws of the realm; therefore, the use of a monopoly is punishable by law."¹

Anything which prevents free competition is, generally speaking, void at common law.
Lord Coke: monopolies are against the ancient and fundamental laws of the realm.

Despite the fact that the common law of the realm was and is against such privileges, we find, however, that monopolies by special grant, concession or royal patent, were not unknown. One of the articles, says Coke, wherewith William de la Pool, Duke of Suffolk, was charged was for procuring of diverse liberties in derogation of the common law and hindrance of justice.² The common law principle that grants, or contracts in restraint of trade, were invalid, as being contrary to the public advantage,

Yet monopolies, in the shape of special privileges, used to be granted by royal patent.

tion of man, had ordained one man to one trade more than to another, and that no civil republic can subsist without distinction of traders . . . There was a distinction of trades and a man could not use two"—2 Rol. Rep. 392. This almost sounds like an echo of the old Indian classification into castes founded upon the basis of their respective callings. It is, however, really an exception to the general trend of informed opinion in England in those days.

¹ See Coke 3 Inst. 181, where the following case is also given. "King Philip and Queen Mary by their letters patent granted to the mayor, bailiff and burgesses of Southampton, and their successors (for that King Philip first landed there) that no wines called malmsies brought into this realm from the parts beyond the seas by any liegeman or alien, should be discharged or landed in any other places of the realm but only at the said town and port of Southampton, with a prohibition, that no person or persons shall do otherwise, upon pain to pay treble custom: and it was resolved by all the judges of England that this grant made in restraint of the landing of the same wines was against the laws and statutes of the realm, viz. Magna Charta 29, 30; 9 E. III C. 1.; 14 E. III; 25 E. III C. 2; 27 and 28 E. III, Statute of the Staple; 2 R. II C. 1, and others; and also that the assessment of treble custom was against law and merely void."

The case of the malmsey wines.

² See Coke 3 Inst. 181.

In the reign of Queen Elizabeth, this practice became notorious.

Old cases under the head of royal patents—the principles which they lay down.

Cases concerning the exclusive right of printing the holy scriptures, law books, etc.

Cases relating to exclusive right of printing.

was often challenged and, in practice, often departed from. In fact, in the reign of Queen Elizabeth the practice of granting patents for monopolies to servants and courtiers¹ by way of reward or encouragement, was carried to such an extreme as to constitute a standing menace to all honest competitive enterprise and emulation. The patents granted by her were sold by the patentees to others, who were thus enabled to raise the price of the commodity as high as they pleased, to the great detriment of the general public.

The old reported cases under the head of royal patents fall into several well-defined classes. Many of them were cases of first impression and had to be decided on their own merits and in view of the principles involved. In one class of cases, it was held that the King might grant to particular persons the sole use of some particular employments, as of printing the holy scriptures and law books.² The

¹ An instance of an established industry deliberately made over to a courtier with monopoly privileges is the starch monopoly granted to one Young. The patent was granted to him on April 15, 1588 (Pat. 30 Eliz., pt. 9). It was transferred to Pakington July 6, 1594 (Pat. 36 Eliz., pt. 13) and re-issued May 20, 1598 (Pat. 40 Eliz., pt. 16). Other examples are the patents for playing-cards to the "pensioners," Bowes and Bedingfield (Pat. 18 Eliz., pt. 12, July 28, 1576); that for vinegar to Richard Drake, "groom of the privy chamber" (Pat. 36 Eliz., pt. 11, March 23, 1584); and that to Thomas Wilkes for salt. Of royal favourites, Sir Walter Raleigh was perhaps the most liberally supplied. See 'The English Patents of Monopoly' by William Hyde Price in which the student will find much interesting information on the subject of English monopoly patents based upon original research.

² The following cases will serve as illustrations: *The Company of Stationers' Case* (15th Nov. 1681)—2 Ch. Ca. 66. This was a case of patent of the sole printing and trading in almanacs. In it will be found a reference to the still earlier cases of *John Streater v. Abel Roper and others* and *Richard Atkinson and another v. George Moore and others* concerning the privilege of printing law books. *The Company of Stationers' Case* (28th Nov. 1681), 2 Ch. Ca. 76,—concerning the sole printing and vending of statute books. *The Company of Stationers' Case*, 2 Ch. Ca. 93,—concerning the sole printing of English Bibles and Statute Books. An anonymous case, Vernon 120, in which an injunction was sought for stopping the sale of English Bibles printed beyond sea on the ground that "for the great mischief that might arise from these Bibles, if they should be suffered to be publicly sold, the sale ought to be prohibited by Court upon that politic account as well as to quiet the King's patentees in their possession." *Hills v. Universitat Oxon*, Vernon 276,—concerning a patent granted by King Charles I to the University of Oxford to print Bibles and other books not prohibited and in which "the Lord Keeper was of opinion that it was never meant by the patent to the University that they should print more than for their own use, or at least but some small number more, to compensate their charge; but as they now manage it they would engross the whole profit of printing to themselves and prevent the King's farmers of the benefit of their patent." *The Corporation of Stationers v. Seymour*, 3 Keb. 792, in which it was found that "the usage of printing hath been regulated by the King and that he by patent granted them (the plaintiffs) the sole printing of almanacs and

reasons given were that "the invention of printing was new ; that it concerned the State and was matter of public care ; that it was in the nature of a proclamation and none could make proclamations but the King ; that, as to law books, the King has the making of judges, serjeants and officers of law ; that they are printed in a particular language and character with abbreviations, etc." ¹ Another important class of cases related to companies of merchant adventurers who had secured exclusive rights of trading and claimed relief against encroachment of such rights by interlopers. The case of the *East India Company v. Sandys* ² stands out prominently as the type of such cases. The company claimed that the King had by his letters patent granted to them the sole trade of buying and selling in the East Indies, and that no one else should trade there. They brought an action against Sandys for having sent a ship into the forbidden waters to the prejudice of the company. It was urged in defence "that trade is free ; that the common law is as much against monopoly as against ingrossing" ³ and that they differ only that a monopoly is by patent from the King, the other is by act of the subject between party and party, but the mischiefs are the same from both, and there is the same law against both." It was ultimately held by Chief Justice Jeffries and his brother justices that the patent was good and binding. ⁴ The argument of Holt and Treby (afterwards Chief Justices of the King's Bench) as counsel in the case is replete with interest even to the present day, containing as it does all the points that can possibly be taken for and against such exclusive trade.

*East India
Company v.
Sandys.*

But of supreme interest is the discussion that arose in the great case of monopolies *Darcy v. Allein*, ⁵

Darcy v. Allein

common prayer books" and judgment was awarded for the plaintiffs. See also *Company of Stationers v. Parker*—Skin. 223.

¹ See Bac. Abr. Vol. V. ; Skin 234.

² Skin. 165, 223, 226.

³ For a definition of 'Ingrossing' see *post* under § 5.

⁴ "A monopoly is no immoral act, but only against the politick part of our law ; which if it happen to be of advantage to the publick, as this trade is, then it ceases to be against the politique part of the law and so not within the law of monopolies"—Skin. 226 ; 10 Howell State Trials 386, 425.

⁵ 11 Co. 84 ; Moor 671 ; Noy. 173 ; 2 Inst. 47. It was this case which really hastened the Statute of Monopolies, as Coke observes : "The said

which was decided in the forty-fourth year of the reign of Queen Elizabeth by Chief Justice Popham. Edward Darcy, a groom of the Privy Chamber to the Queen, brought an action against T. Allein, haberdasher of London, and declared that Queen Elizabeth "intending that her subjects being able men to exercise husbandry should apply themselves thereunto, and that they should not employ themselves in making playing cards which had not been any ancient manual occupation within this realm, and that by making such a multitude of cards, card-playing was becoming more frequent, and especially among servants and apprentices and poor artificers; and to the end that her subjects might apply themselves to more lawful and necessary trades" by her letters patent granted to the plaintiff full power license and authority to buy in any part beyond the sea all such playing cards as he thought fit and to import them into the realm and that he should have and enjoy the whole trade, traffic and merchandise of all playing cards. The defendant, knowing the grant and prohibition in the plaintiff's letters patent, caused several grosses of playing cards to be made and sold in the country, and imported others and was accordingly sued for infringing upon the exclusive privileges of the plaintiff. The case was argued by eminent counsel and all possible points were taken for and against the legality of such monopoly. It is scarcely possible here to enter upon a detailed discussion of all the principles enunciated and put forward in the case. But there are three inseparable incidents to every monopoly which were forcibly brought out in the course of argument as affecting the common weal, and it would be useful to consider those. First, that every monopoly is calculated to raise the price of commodity in respect of which the monopoly is enjoyed, "for he who has the sole selling of any commodity may and will make the price as he pleases."¹ Secondly, after

case of monopolies, Trin. 44, Eliz., was the principal motive of the King's book mentioned in the preamble of this Act (Stat. 21 Jac. C. 3)"—Coke 3 Inst. 183.

¹ This argument is adopted in *E.I. Co. v. Sandys*: "All evils attending monopolies are in this—the first evil is enhancing the price mentioned in 11 Co. Rep. 88. Nothing is plainer than that they have had the setting of their own price, and for a man to come to such a contempt of riches

the monopoly is once granted there is a tendency for the commodity to go down in quality, "for the patentee having the sole trade regards only his private benefit and not the common weal." Thirdly, it throws honest and independent workmen out of employment and "tends to the impoverishment of diverse artificers and others who before, by the labour of their hands in their art or trade, had maintained themselves and their families who now will of necessity be constrained to live in idleness and beggary." On these and other grounds¹ it was held that the grant was utterly void as being a monopoly and against the common law and diverse Acts of Parliament.²

as not to get what he can when he hath it in his power is such a virtue as is not ordinarily met with in mankind"—Skin. 170.

¹ The grant was declared void for the following reasons:—

"(1) All trades, as well mechanical as others, which prevent idleness, (the bane of the commonwealth) and exercise men and youth in labour, for the maintenance of themselves and their families, and for the increase of their substance, to serve Queen when occasion shall require, are profitable for the commonwealth; and therefore the grant to the plaintiff to have the sole making of these is against the common law and the benefit and liberty of the subject.

(2) The sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects; for the end of all these monopolies is for the private gain of the patentees.

(3) The Queen was deceived in her grant; for the Queen as by the preamble appears, intended it to be for the weal public and it will be employed for the private gain of the patentee, and for the prejudice of the weal public.

(4) This grant is *primae impressionis*, for no such was ever seen to pass by letters patents under the great seal before these days, and therefore, it is a dangerous innovation as well without any precedent or example as without authority of law or reason." See also Bac. Abr. Vol. V. and Hawk. P. C. Ch. 29 where it is observed: "Also it hath been adjudged that the King's grant of the sole making importing and selling of playing cards is void notwithstanding the pretence that the playing with them is a matter merely of pleasure and recreation and often much abused and, therefore, proper to be restrained; for since the playing with them is, in itself, lawful and innocent, and the making of them an honest and laborious trade, there is no more reason why any subject should be hindered from getting his livelihood by this than any other employment."

² The case of *Davenant v. Hurd* was cited in support of this position. "In that case a company of merchant tailors in London having power by charter to make ordinances for the better rule and government of the company, so that they were consonant to law and reason, made an ordinance that any brother of the society who should have any cloth dressed by a cloth-worker, not being a brother of the society, should put one half of his cloth to some brother of the same society who exercised the art of a cloth worker, upon pain of forfeiting ten shillings; and it was adjudged that the ordinance, although it had countenance of a charter, was against the common law, because it was against the liberty of the subject; for every subject, by the law has freedom and liberty to put his cloth to be dressed by what cloth-worker he pleases and cannot be restrained to certain persons, for that in effect would be a monopoly and therefore such ordinance by colour of a charter or any grant by charter to such effect, would be void."

Public policy demands an adequate recognition of these three incidents of monopoly in every legislation, or judicial decision.

What is 'public policy'? Warning against a misuse of the expression.

The problem of monopoly cannot be solved without regard to question of public policy.

How far legislation and judicial decisions have successfully kept this end in view.

Summary:—a monopoly based on express grant is a 'concession.'

It will be seen as we proceed that these three grounds are fundamental, and no sound policy of legislation can afford to disregard them under any set of social or industrial conditions. Had judicial decisions in England and in America, in connection with the larger developments that have since taken place in the economic world in the shape of capitalistic monopolies (see *post*, § 5) proceeded on a strict and unbiassed estimate of the influence of these three factors, they would have succeeded in defining and regulating public policy on a fairly satisfactory basis.

"Public policy is a very unruly horse and when once you get astride it you never know where it will carry you".¹ At the first blush these words appear to carry a wholesale condemnation of the abuses to which the application of the principle of public policy has been put. Taken, however, as words of warning they serve as a helpful guide through the mazes of monopoly law. In no department of law do the notions of public policy, public interest or public weal play such a considerable part as in that of monopoly. Indeed, the whole problem which monopoly law has to face is how to weigh the claims of different social, economic, customary and other forces at work, and judge which of them would conduce to the greatest good of the community, and which of them, on that ground, should receive the stamp of legal authority. It must be confessed that this standpoint has not uniformly been kept in view, and confusion of thought has often resulted in consequence. An endeavour will be made in these lectures to show how far legislation and judicial decision have been able successfully to keep this end in view. In so far as judicial decisions have been able to keep clear of prejudice and proceed on this principle of public good, they have evolved a consistent and harmonious system of law applicable not only to monopolies proper but also to phenomena akin to monopolies.

To sum up the discussion under the third head, viz. express grant as a basis of monopoly. *Monopoly looked at in this light is a concession*² or exclusive

¹ Per Burrough J. in *Richardson v. Mellish* (1824), 2 Bing. 229, at p. 252.

² The term 'concession' is not generally used in England with reference

right based upon an express grant or authority, the legal validity of such grant resting ultimately on grounds of public advantage. It is on the ground of public policy that the King's grant to any particular corporation¹ of the sole importation of any merchandise is void. Hence also the King's charter empowering particular persons to trade to and from a particular place is void, so far as it gives such persons an exclusive right of trading and debarring all others.² "It seems now agreed that nothing can exclude a subject from trade but an Act of Parliament."³

And its legal validity rests on grounds of public welfare.

EXCEPTIONS TO THE COMMON LAW RULE AS TO MONOPOLIES.

Such being the general view of the common law, we may now pass on to consider the exceptions to such law which are well recognised. The exceptions, it may be observed, only prove the rule, inasmuch as their justification rests on the principle of public good. The first of these exceptions is a patent granted in respect of a new invention; and the principle on which such a monopoly patent may be granted appears to have been well recognised before the Statute of Monopolies (1624). Thus in the great case of monopolies *Darcy v. Allein*⁴ we find the principle of common law clearly expounded. "Where any man by his own charge and industry, or by his own wit or invention, doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that never was used before, and that for the good of the realm; in such cases the King may grant to him a monopoly patent for some reasonable time, until the subjects may learn the same, in consideration of

The common law rule is against monopolies. But there are well-recognised exceptions, based on public policy.

First Exception—patent.

The principle of common law, re validity of patents, discussed in the case of *Darcy v. Allein*.

to these special privileges. But it is so used in France and seems rather felicitous for expressing the idea which it connotes. It has been current in France for the last three centuries, and is used in the sense of a right of property, privilege or monopoly granted by Government to individuals or groups of individuals, in land, mines, public works, railways, performance of stage-plays and, generally speaking, in anything that can be monopolised. In India it is used most often of mines, as in the case of the ruby mines of Upper Burma.

Use of the term 'concession' in France and India.

¹ The Statute of Monopolies 21 Jac. C. 3 makes an exception in favour of corporations. See Sec. IX of the Statute.

² For exceptions to this rule resting on considerations of public advantage, see *supra*.

³ Bac. Abr. Vol V, under the head of 'Monopolies.'

⁴ Noy. 184.

The principle
adopted by the
Statute of
Monopolies, 21.
James 1. C. 3, secs.
5 and 6.

the good that he doth bring by his invention to the commonwealth, otherwise not." This principle of exception was soon afterwards recognised and adopted by the Statute of Monopolies in sections 5 and 6 thereof.¹ Section 5 provided that the Act should not extend to any letters patent or grants of privilege theretofore made, and sec. 6 provided for a similar exception in favour of patents thereafter to be made. In the former case, the maximum term allowed for the patent was twenty-one years and in the latter case fourteen years. But the rest of the provisions in both the sections are similar. Thus, in England, the Crown always appears to have exercised a control over the trade of the country,² but such control was regulated and kept within reasonable limits by the common law and, later, by the Statute of Monopolies. The effect of such regulation was that the Crown might grant the exclusive right to trade with a new invention³ for a reasonable period. The Statute of Monopolies, it should be observed, did not create but simply regulated the power of the Crown, in granting to the first inventors the privilege of the sole working and making of new inventions, and in doing so it simply carried out and enforced the already existing principle of common law.

The principle of regarding a patent for a useful invention as a proper exception to the old common law prohibition of monopolies has been adopted in America⁴ by Congress, and well elucidated in many

Other exceptions,
besides patent,
provided for in
the Statute of
Monopolies.

¹ There are also other exceptions provided for in secs. 8, 9, 10, 11 and 12 of the Statute which save warrants to justices, charters to corporations, letters patents concerning printing, or concerning the digging, making or compounding of saltpetre or gunpowder, the casting or making of ordnance or shot for ordnance, commissions for alum or alum-mines, the liberties of the Hostmen of Newcastle upon Tyne, licences for keeping taverns, etc.

² *Vide* Elizabeth's reply to the address which was presented to her by the House of Commons touching the abuse of monopolies and praying that the patents granted by her might be repealed or superseded. She replied through Lord Keeper that she "hoped her dutiful and loving subject would not take away her prerogative, which is the choicest flower in her garden and the principal and head-pearl in her crown and diadem; but would rather leave that to her disposition, promising to examine all patents and abide the touchstone of the law." Taswell-Langmead's *English Constitutional History*, p. 495.

³ On this subject of novelty of the invention see the following cases:—*Rex v. Arkwright*, Dav. Pat. Ca. 129; *Manton v. Moore*, *ibid.* 333; *Brunton v. Hawkes*, 4 Barn & A. 540; *Thomson v. Forman*, 2 B. Moo. 424; *Rex v. Cutler*, 1 Stark Ca. 354; *Wood v. Zimmer*, 1 Holt Ca. 58; *Bovill v. Moore*, Dav. Pat. Ca. 361; *Edgebury v. Stephens*, 1 Salk 447.

⁴ U.S. Rev. Stat. S. 4883-4936; U.S. Comp. Stat., 1901, pp. 3380 *et seq.*; Supp., 1909, pp. 1269 *et seq.* See also 5 Fed. Stat. Annot. p. 417 *et seq.*

cases in the United States. Thus in a case decided in the year 1870 in the United States Supreme Court, Mr. Justice Clifford said:—Letters patent are not to be regarded as monopolies, created by the executive authority at the expense and to the prejudice of all the community except the persons therein named as patentees, but as public franchises granted to the inventors of new and useful improvements for the purpose of securing to them, as such inventors, for the limited time therein mentioned, the exclusive right and liberty to make and use and vend to others to be used in their own inventions, as tending to promote the progress of science and the useful arts, and as matter of compensation to the inventors for their labour, toil and expense in making the inventions, and reducing the same to practice for the public benefit, as contemplated by the Constitution and sanctioned by the laws of Congress.¹ The following is another clear exposition of the policy: “It is the policy of the law in this country and has been enacted by Congress, under the powers given to it by the constitution, that if a man finds out something new and useful, and publishes it to the world through the intermediation of the patent office, he shall in exchange for it and as a compensation for doing so, receive a patent; that is, he receives a grant of monopoly of manufacturing, selling and using that particular invention for a certain period of time. . . . That monopoly is not a monopoly in the sense in which the word first came into the English language where, without anything at all except the mere whim of sovereign power some extraordinary privileges were granted to individuals. . . . There is nothing obnoxious to law or good morals, or to anything else in the fact that a patent secures to the holder of it a monopoly for a limited period of time.”²

Another way of looking at a patent is that it is of the nature of a contract between the Crown and the patentee, whereby the Crown secures to the patentee the right to vend and use his invention for a few years, the consideration for such privilege being

¹ *Seymour v. Osborne*, 11 Wall (60 U.S.) 516, 533.

² *International Tooth Crown v. Hanks Dental Association* (U.S.C.C.), 111 Fed. 916, 917, *per* Lacombe, Cir. J.

the good brought to the commonwealth by the inventor, for "he has perfected and described it and has granted its use to the public forever after."¹

Contrary view, still held in some quarters, that a patent is an odious monopoly.

On the other hand, there are still some who hold that not only is a patent privilege a true monopoly, but that it approaches very nearly to an odious monopoly in its restriction of the pre-existing public right. Thus Robinson in his well-known treatise on the law of patents says: "The nature of the patent privilege differs from an odious monopoly in this: that in the odious monopoly the public are deprived of some existing method of enjoying these rights, while the patent privilege prevents their exercise only in the new direction marked out by the discovery of the inventor. But in both cases the rights restricted are the same, and the effect on their enjoyment after the monopoly is granted is identical. That a patent privilege is a true monopoly derogatory to common right, is, therefore, the correct theory concerning it, considered in itself."²

The law of patents in India.

In India substantially the same law prevails as in England and America. The Indian Patents and Designs Act of 1911 (Act II of 1911) has taken advantage of the consolidation of the English statutes which the Patents and Designs Act of 1907 effected, and has brought the practice and procedure in this country for obtaining an exclusive privilege more into conformity with that of the United Kingdom, 'Invention,' according to the Act, means "any manner of new manufacture, and includes an improvement and an alleged invention."³ Although, however, an invention includes an improvement, it does not by any means follow that any improvement is an invention. It is impossible to lay down any hard and fast rule as to what improvements should be considered to be inventions. It would be a question for the Court to determine whether the amount of inventive power displayed was such as to justify the grant of a patent.⁴

¹ Joyce on Monopolies § 283; Halsbury's 'Laws of England,' Vol. 22, § 275; Ipswich Cloth Worker's Case (1614), Godb. 252.

² Robinson on Patents (Ed. 1890).

³ Sec. 2, sub-sec. 8.

⁴ I.L.R. 17. All. 490. In the same case it is observed: "There may be a valid patent for a new combination of materials previously in use or for a new method of applying such materials"—referring to *Hill v. Thompson and Foreman*, 3 Mer. 622; 1 Webb P.C. 299.

The second exception to the common law prohibition regarding monopolies is made in favour of copyright. This may be regarded as an extension of the patent law to the department of intellectual and artistic originality. At common law, the author, or his assignee, of any *unpublished* composition of a literary character had a proprietary right or interest therein. He had the exclusive right to copy the manuscript. He might withhold it or communicate it, and if he communicated it he might limit the number of the persons to whom it was to be imparted, and impose such restrictions as he pleased upon the use of it. This common law right was distinct from the right created by statute. The latter is limited in respect of time, the former (which subsisted until the publication of the composition) was unrestricted as to time. When the book or composition is published, the owner's common law right is lost and a statutory copyright, by which is meant the sole and exclusive right of multiplying copies of a book by printing or otherwise for a limited period, springs into existence. As Lord St. Leonards in the case of *Jeffreys v. Boosey* observed: "When we are talking of the right of an author we must distinguish between the *mere right to his manuscript*, and to any copy which he may choose to make of it, as his property, just like any other personal chattel, and *the right to multiply copies* to the exclusion of every other person. Nothing can be more distinct than these two things. The common law does give a man who has composed a work a right to that composition, just as he has a right to any other part of his personal property; but the question of the right of excluding all the world from copying, and of himself claiming the exclusive right of forever copying his own composition after he has published it to the world, is a totally different thing."¹ Baron Parke, in the same case, pointed out expressly these two different legal senses of the word copyright, viz. *first*, the *right in the copy*, a right of possession, always fully protected by the common law; and, *secondly*, the *right to copy*, a right of multiplication, which alone has been the subject of special statutory

Second
Exception—
Copyright.

Copyright at
common law.

Copyright under
the Statute.

Lord St. Leonards
in *Jeffreys v.*
Boosey.

¹ (1854) 4 H.L.C. 815 at p. 978, S.C. 10 Eng. Rep. 681.

Millar v. Taylor

Donaldsons v. Beckett.

Statute 8 Anne C. 19.

Statute 54 Geo. 3 C. 156, S. 4.

Lord Chancellor Hardwicke in *Gyles v. Wilcox*: The privilege of copyright does not come within the odium of a monopoly.

American view on the subject.

protection. There was much contention in England as to whether the common law recognized this property in copyright before the statute of Anne (8 Anne C. 19). In the case of *Millar v. Taylor*¹ which was argued at great length it was contended on behalf of the plaintiff that under the common law a sole and exclusive copyright in perpetuity vested in the author or his assign or assigns, after publication of the book, whereas it was urged on behalf of the defendant that it was the printer and not the author who formerly enjoyed such right. The controversy went on till the decision in the House of Lords in the case of *Donaldsons v. Beckett*,² the result of the decision being that a majority of the judges, while in favour of the common law right, held the same had been taken away by the statute.³

Statutory copyright was first granted by 8 Anne C. 19, whereby it was provided that "the author of any book or books and his assignee or assigns shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years." The term of fourteen years was extended by statute 54 Geo. 3. C. 156, S. 4, to twenty-eight years, and if the author should be living at the end of that period, for the residue of his natural life. The reason for regarding the privilege of copyright as not coming within the odium of a monopoly in the old common law sense is to be found in Lord Chancellor Hardwick's decision in the case of *Gyles v. Wilcox*.⁴ In that case he held that the provisions of statute 8 Anne C. 19 for the vesting of the copies of books in authors were not in the nature of a monopoly and ought to receive the most liberal construction, "for it is very far from being a monopoly, as it is intended to secure the property of books in the authors themselves or the purchasers of the copy as some recompense for their pain and labour, in such works as may be of use to the learned world." This principle holds goods even to the present day, as we find from a well-known treatise on the law of copyright. "Copyright is a monopoly to which the Govern-

¹ (1774) 4 Burr. 2303, S.C. 98 Eng. Rep. 201.

² (1774) 4, Burr. 2408, H.L. S.C. 98 Eng. Rep. 257.

³ See *Wheaton v. Peters*, 8 Pet. (33 U.S.) 591, 8 L. Ed. 1055.

⁴ 2 Atk. 143.

ment assures protection in granting the copyright. It is a monopoly not in the offensive sense, but in the sense of private and personal ownership; the public is not the loser, but is the gainer by the protection¹ and encouragement given to the author.”² The statutes relating to copyright in British India have now been consolidated by the Indian Copyright Act, Act III of 1914, which is in the main based on the English Copyright Act of 1911, with a few modifications which will be discussed in a later lecture.

The law of copyright in India.

The third exception to the common law rule as to monopolies is to be found in the law relating to trade-marks and trade-names. The admission of these to the privilege of patents was a comparatively later phenomenon. But in course of time and with the development of trade the recognition was bound to come. It gradually came to be perceived that the state protection of exclusive trade-marks was beneficial from all points of view—beneficial to the public inasmuch as they could buy with confidence when they knew what they were getting, and beneficial to the trader because it would stereotype and secure his custom and good-will.³ Thus it does not answer to any of those reprehensible qualities which, in the eye of the old common law, characterised a monopoly. It is, therefore, a natural and a proper exception to the ordinary common law rule. The interesting method of argument which is adopted in making out that the law of trade-marks is such an exception will appear from the following specimen of a judgment in an American case. Speaking of a man's assertion of his exclusive right to a trade-mark it is said: “Monopoly is not the thing for which the one party struggles and which the other party resists. On the contrary, fair trading is all for the protection of which the law is

Third Exception—Trade-marks and Trade-names.

Policy of the law re trade-marks.

American rulings adopt the view that a trade-mark does not come within an odious monopoly.

¹ As Herbert Spencer says: “If I am a monopolist, so are you; so also is every man. If I have no right to those products of my brain, neither have you to those of your hands. No one can become the sole owner of any article whatever, and all property is robbery.”

² Bowker's ‘Copyright,’ p. 50.

³ For an exposition of the history and theory of the law of trade-marks, see the judgment of Lord Blackburn in *Singer Manufacturing Co. v. Zoog*. 8. A.C. 29.

Trade-mark is thus defined in the Indian Merchandise Marks Act: “A mark used for denoting that goods are the manufacture or merchandise of a particular person is called a trade-mark.”

invoked; and the public, as well as the manufacturer or merchant, are concerned that infringement of trade-marks and trade-designation should be prevented.”¹

Other recognized exceptions besides the above three.

Fourth Exception—Customary monopolies.

Docks and cranes in a port town—those affected with a public character and those that are not.

It will be observed that the criterion of legality in the above three exceptions in favour of patents, copyright and trade-marks is the encouragement of originality, enterprise and invention. But there are two other recognized exceptions in which although the test above mentioned is not strictly applicable, the law allows monopoly of a sort to be enjoyed. These are monopolies that rest on custom or contract.

Under the head of customary monopolies may be mentioned, among others, ferries, cranes, weighing machines, docks, and markets. In these cases, it has been held that the Courts could exercise some sort of vague control based on considerations of public advantage. For instance, in the case of a dock-owner his rights and duties are defined by Sir Matthew Hale, who observes that a man for his own private advantage “may in a port town set up a wharf or crane and may take what rates he and his customers may agree for crantage, wharfage, etc., for he doth no more than what is lawful for any man to do, *viz.* make the most of his own.”² But “if the King or subject have a *public* wharf, into which all persons that come to that port must come and unlade or lade their goods, as for the purpose because they are wharves only licensed by the Queen, according to the statute 1 Eliz. C. 11 or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary or excessive duties for crantage, wharfage, etc.; neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the King’s license or charter; for now the wharf, the crane and other conveniences are *affected with a public trust* and they cease to be *juris privati*

¹ Lord Craighill in *Dunnachie v. Young & Sons*, Ct. Sess. Cas. 4 S. X. 874, cf. *Blackwell v. Wright*, 73 N. Car. 310.

² This does not necessarily mean that he can charge exorbitant rates. “Wherever a party happens to have the benefit of a legal monopoly, of landing goods in a public port, *e.g.* where he is the owner of the sole wharf authorized to receive goods in a given port, then he must take reasonable compensation only for the use of his monopoly”—Sir Matthew Hale’s *De Portibus Maris*.

only. As if a man set out a street on his land, it is no longer bare private interest, but it is affected with a public interest."¹

Thus it was held in the case of *Allnut v. Inglis* *Allnut v. Inglis.* that "where a monopoly is intended for the public good, it cannot be exercised by the grantee for his mere private advantage without regard to the rights and interests of the public."²

In olden days, when the whole of the retail trade *Markets and fairs.* which is now transacted by means of shops used to be carried on by means of markets or fairs, a market was recognized as a monopoly and the monopoly was strictly enforced. The setting up a new market or fair within a certain radius of the already existing market, which enjoyed the monopoly, and holding it on the same day as the existing market-day, was held to be an encroachment and put down as a nuisance.

The attitude of the common law was similar with regard to ferries. In both there was a pronounced tendency to favour monopoly.

From very olden times certain contracts fell under the condemnation of the common law as being contracts 'in restraint of trade,' i.e. on the ground that they in fact restrained or were calculated to restrain trade. 'Trade' is a very comprehensive term and embraces within its meaning not only mechanical pursuits but, in the broad and general sense, all occupation or business, carried on for subsistence or profit.³ *Fifth Exception—Monopolies based on contract, sometimes called 'contractual' monopolies. Contracts in restraint of trade condemned by the common law.* The general principle of common law is that a man 'Trades'—what it means. The general principle of should be free to exercise any lawful trade as and

¹ Sir Matthew Hale's *De Portibus Maris*.

² Where the London Dock Co. having built warehouses in which wines were deposited upon payment of such a rent as they and the owners agreed upon, afterwards accepted a certificate from the Board of Treasury under the Warehousing Act, 43 G. III C. 132, whereby it became lawful for the importers to lodge and secure wines there without paying the duties in the first instance, and it did not appear that there was any other place in the port of London where the importers had a right to bond their wines; it was held that such monopoly was enjoyed by them for the public benefit, and that they were bound by law to receive the goods into their warehouses for a reasonable hire and reward.—*Allnut v. Inglis*, 12 East, 527; Lord Ellenborough's observations at p. 538.

³ It would seem that the pursuit of the liberal arts or the learned professions, such as medicine or law, would come within it. See the following cases: *Bunn v. Guy*, 4 East, 190,—case of an attorney; *Davis v. Mason*, 5, Term R. 118,—case of a surgeon; *Hayward v. Young*, 2 Chitty 407,—case of a surgeon and man midwife; *Mallon v. May*, 11 M. & W., 652,—case of a surgeon and apothecary; *Builer v. Burleson*, 16. Vt. 176,—case of a physician and Surgeon. See also Spelling's 'Trusts and Monopolies,' Ch. II.

common law—
perfect freedom of
trade.

Is freedom free
to slay herself ?

When a man
contracts himself
out of his freedom,
what is to be the
attitude of law ?

where he wills. But the question arises, 'Is freedom free to slay herself?' Suppose one chooses to barter away one's own freedom, or, in other words, to enter into a contract with another whereby one voluntarily restricts one's own freedom and undertakes not to carry on one's trade freely as and where one likes. What is to be the attitude of the law towards him or towards such contract? Under such circumstances, if the contract were to be declared void, the law would virtually be interfering with freedom of contract. If, on the other hand, the law were to allow such contracts to be entered into and enforced, it would be encouraging restraint of trade. And what is restraint with the party so contracting himself out of his freedom, is monopoly in respect of the party in whose favour the contract is made.

James V. C. in
Leather Clock Co.
v. Lorsoni.

Judges have constantly been confronted by this dilemma between public policy requiring restraints on restraints of trade, and public policy requiring the utmost possible freedom of contract. Thus James V. C. in *Leather Clock Co. v. Lorsoni*¹ says: "Public policy requires that every man shall be at liberty to work for himself and *shall not be at liberty to deprive himself or the State of his labour, skill or talent* by any contract that he enters into. On the other hand, public policy requires that when a man has by skill, or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser." On the other hand, Jessel M. R. in *Printing and Numerical Registering Co. v. Sampson*² says: "It must not be forgotten that you are not arbitrarily to extend those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that *contracts when entered into freely and voluntarily shall be held sacred*, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, that you are

Jessel M.R. in
Printing and
Numerical
Registering Co. v.
Sampson.

¹ (1869) L.R. 9. Eq. 345.

² (1875) L.R. 19. Eq. 462.

not lightly to interfere with this freedom of contract." See also the observations of Best C.J. in *Homer v. Ashford*¹ where he points out clearly in what cases contractual restraints on one's own freedom of action should be held void, and in what cases upheld by law. With reference to the latter he observes: "But it may often happen that individual interest and general convenience render agreements not to carry on trade, or to act in a profession, in a particular place proper. Manufactures or dealings cannot be carried on to any great extent without the assistance of agents and servants. These must soon acquire a knowledge of the manufactures or dealings of their employers. A merchant or manufacturer would soon find a rival in every one of his servants, if he could not prevent them from using to his prejudice the knowledge acquired in his employ. Engagements of this sort are not injurious restraints of trade, but securities necessary to those who are engaged in it. The effect of such contracts is to encourage rather than cramp the employment of capital in trade and the promotion of industry."

Best C.J. in
Homer v. Ashford.

In the dilemma above described the common law at an early stage took the view that any interference with trade must be jealously put down, even, if, to compass such an end, it were necessary to interfere with freedom of contract in individuals. But the matter after all was not so easy of solution. The antinomies of law resulting from the dubious verdicts yielded by considerations of public policy render this subject peculiarly difficult. The law reports abound with judgments obviously inconsistent and often contradictory. It is not proposed in this lecture to deal with the subject in any detail. It is observable, however, that the law has passed through several well-marked stages in order to arrive at its present form.

Antinomies
arising from
different views
as to public
policy.

Different stages
of the law as to
contracts in
restraint of trade.

The earliest view was, as above noted, one of unqualified disapproval of any agreements that purported in any way to limit the freedom of a subject in exercising his trade or profession to the fullest extent. All agreements whether general or restricted to a

The earliest view.

¹ (1825) 3 Bing. 322.

The next stage:
Mitchell v.
Reynolds.

Chief Justice
Parker's two
propositions.

The test of
space-limit, how
far sound.

The test of time-
limit, by analogy.

particular area were held bad. The next stage was marked by the decision in the case of *Mitchell v. Reynolds*¹ in which Chief Justice Parker, afterwards Lord Macclesfield, after much consideration laid down the doctrine that a general restraint was of necessity void, but a partial restraint might be good, if reasonable. He lays down two striking propositions: *First*, that to obtain the sole exercise of any known trade throughout England is a complete monopoly, and against the policy of the law. *Secondly*, that when restrained to particular places or persons (if lawfully and fairly obtained) the same is not a monopoly. The test of space-limit thus laid down has been severely criticised and perhaps justly so, for a monopoly is none the less a monopoly because it is circumscribed in space. On the other hand, attempts have been made to extend the idea of limit, by analogy, to time.² The law continued in a more or less uncertain and nebulous state for some time until it was considerably simplified by the judgments in the famous *Maxim Nordenfelt* case.³ The law now is clear that whether a restraint is general or partial, its validity is to be determined by the consideration whether it exceeds what is reasonably necessary for the protection of the covenantee; that is, the criterion of reasonableness which was formerly applied only to partial restraints must now be applied to restraints of every kind. It is doubtful whether this test of reasonableness is final, or whether the question of public policy must be considered, in addition to that of reasonableness, to secure the final validity of the contract.

§ 5 COMBINATION—*A Basis of Monopoly Formation.*

The idea not
absolutely
unknown in
olden times.

We now pass on to consider a comparatively newer phase of monopoly. Not that the idea was absolutely unknown to old-time methods of trade or business. But the development of modern industrial-

¹ (1711) 1 P. Williams, 181.

² *Ward v. Byrne* (1839) 5 M. & W. 548; *Davies v. Davies*, per Cotton L.J., 36 Ch. D. 359; *Badische Anilin und soda fabriek v. Schott Segner & Co.* (1892) 3 Ch. 447.

³ *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.* (1894) A.C. 535.

ism has brought in its train certain forms of monopoly which would have been impossible under old-world conditions. I refer to the Kartells, Combines and Trusts. From contracts in restraint of trade to combinations is not a far cry, if we look to the principle involved. At bottom it is the same old question of the legality of restraining the free action of others on the ground that it benefits only one fortunate trader—in other words, the legality of monopoly itself. But so varied are the methods and procedure adopted by combinations¹ and so vast the magnitude of their operations that in the actual treatment of the subject one has to deal with problems altogether novel,—problems peculiar to modern industrial conditions.

But modern industrialism is alone capable of producing the monopolistic combinations of the present day.

In discussing the 'legal monopolies' we had occasion to notice the strong view which the common law took in the sixteenth and seventeenth centuries concerning any act on the part of an individual calculated to restrict the business of others. The conditions of trade, however, in those days were quite different. Since the reign of Queen Elizabeth the conditions of trade and commerce have been completely revolutionised. New methods of communication, such as by post and telegraph, and by rapid-transit agencies like steam and electricity, have become accessible to all. The area within which each trade is now carried on has thus undergone incredible expansion. New and diverse processes of manufacture have grown up, and the scale of production has gone up a hundred-fold. It would not do for any man now to say, for instance, as Coke did in his day, that "bonnets and caps should be thickened and fulled by the strength of men and not in a fulling mill, for it was holden inconvenient to turn so many labouring men to idleness." Such a view would at the present day be regarded as antiquated and ridiculous.

Changes in the conditions of trade and commerce.

With the manifold changes referred to above, there came a great change over the doctrine of freedom of competition, so much so that President Andrews could go the length of observing: "The day of old-

Corresponding change in the doctrine of free competition.

¹ The term 'Combination' is here used in the sense of capitalistic monopoly, to be explained presently; and not in the sense of Trade or Labour Unions.

Industrial
monopolies :
causes and
factors

time competition has set. Law or not law, capital will henceforth march mostly in phalanxes."¹ It cannot be gainsaid that, under the modern form of industrial organization, immense amounts of capital are required for achieving anything like success. Competition between great establishments often becomes so fierce that ruin threatens all the rival establishments unless some form of agreement between them is reached. It is but natural that individual business men unable to cope single-handed with the growing difficulties should meet the situation by forming a combination, that is, a concentration of wealth, skill and business ability. In many instances they are aided by the rail-roads, which give them preferential freight rates. The tariff law is also of supreme help in many instances.² Whether they form Pools, Kartells or Syndicates, or whether they resort to the system devised by the genius of John D. Rockefeller and establish Trusts, is indeed only a matter of form.³ But the fact remains that combinations and coalitions are still on the increase.

Instances of
capitalistic
monopolies.

The rapid growth of monopolies of this description, perhaps best described as 'capitalistic monopolies,' was particularly favoured by the industrial and economic conditions prevailing in the United States. The first great monopoly of this class was the Standard Oil Company, which through a process of rapid growth through ten or fifteen years, with the advantage of lower freight rates on the railroads than its rivals could secure, was organized into the Standard Oil Trust—a combination able to control eighty-five per cent of the total output of refined petroleum in the country. The other most important capitalistic monopolies are the American Sugar Refining Co. (Sugar Trust), the Distilling and Cattle Feeding Co. (Whiskey Trust), besides several other big combinations controlling cotton-seed oil, linseed oil, white lead, dressed meat, cordage and tobacco. At present, the monopolies in the United States are so many that a mere

¹ Quoted by Ernest Von Halle in his 'Trusts or Industrial Combinations in the United States' at p. 10.

² Mr. Francis W. Hirst in his book 'Monopolies, Trusts and Kartells' speaks of "Mr. Havemeyer's candid avowal that tariff is the mother of trusts."

³ See Lects. XI, XII.

list of their names would fill several closely printed pages. It is not within the scope of this lecture to enter into a detailed discussion of the various forms these organizations take, or their economic advantages or disadvantages.¹ But we may pause to consider the central idea underlying a monopoly viewed in the light of these capitalistic combinations. The ideas of differential advantage, of limitation and of exclusiveness (see §§ 1, 2, 3 *ante*) are all there. But that of express grant or authority, which is the central feature of 'legal monopolies,' is absent. Instead of that, the basis of a capitalistic monopoly is a certain unified control over a particular business calculated to drive competitors, wholly or partially, out of the field, and secure the predominance of one or more persons who hold such control. It is in this sense that Prof. Ely speaks of monopoly when he says: "Monopoly means the substantial unity of action on the part of one or more persons engaged in some kind of business which gives exclusive control more particularly, although not solely, with respect to price. * * *The essence of monopoly is substantial unity of action.*"² The point is forcibly brought out in the decisions of American courts: "The idea of monopoly is not now confined to a grant of privileges. It is understood to include a 'condition produced by the act of mere individuals.' Its dominant thought now is, 'the notion of exclusiveness or unity'; in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action."³

The central idea underlying monopoly, viewed as a combination.

Unified control.

The essence of monopoly is substantial unity of action.

American rulings elucidate this point.

No doubt the United States may be called the home of capitalistic monopolies. But it is not an altogether uncommon phenomenon in Great Britain, while in the Continent, especially in Germany, such monopolies abound, although the characteristics vary.

¹ Prof. Jenks lays great stress upon the great economic advantages derivable from big combinations. A good summary of their good and evil qualities will be found in Ch. XI of his book 'The Trust Problem.' See also 'The Control of Trusts' by John Bates Clark.

² Prof. Ely's 'Monopolies and Trusts,' p. 14.

³ *National Cotton Oil Co. v. Texas*, 197 U.S. 115; 25 *supm.* 397; 49 L. Ed. 689 (1905). See also *People v. North River Sugar Refining Co.*, 54 Hun. 355, 377; 3 N.Y. *suppl.* 401, 413; 2 L.R.A. 33, 42 (1889); and other cases quoted under § 117 of F. H. Cooke's 'Combinations, Monopolies and Labour Unions.'

It will be our endeavour to trace the development of these monopolies in a later lecture, and also to study the course which modern legislation and judicial decisions have taken on the subject.

LECTURE II.

KINDS AND CLASSES OF MONOPOLIES.

In the foregoing lecture no attempt was made to arrive at a systematic classification of monopolies, or to discuss the merits of the different classifications offered by different authors. An endeavour was made to estimate the value of the different forces—social, economic or otherwise—that underlie the growth and formation of monopolies in different parts of the world. The discussion of the question of classification was reserved for separate treatment. But it is to be observed that classification of a sort was incidentally introduced. The classes hitherto broadly indicated are:—

(I) *Natural Monopolies*—due to favourable natural arrangements of soil or situation, ability, aptitude and the like.¹ I.
Natural Monopolies.

(2) *Legal Monopolies*—which owe their origin to express grant or authority or to the direct sanction of common law or statute, e.g. patents, copyrights, trademarks, etc.² II.
Legal Monopolies.

(3) *Capitalistic Monopolies*—or those which are the outcome of the acts of an individual or individuals; in other words, the outcome of the social will, or of social, industrial and economic conditions, irrespective of express grant or authority.³ III
Capitalistic
Monopolies.

It will be seen as we proceed that the above three classes cover a wide ground in the field of monopolies. There is only one important class which was not specially touched upon in the last lecture, viz.:

(4) *Governmental and Municipal Monopolies*—It is necessary before we deal with the classification of monopolies to indicate the character and conditions of the last-mentioned class of monopolies. IV.
Governmental
and Municipal
Monopolies.

These really come under monopolies by express grant, for they invariably owe their origin to authority from the sovereign power, or the legislature. But they are treated separately for convenience, because

¹ See § 1, Lecture I. ² See § 4, Lecture I. ³ See § 5, Lecture I.

they involve questions of state policy different from those that arise in ordinary cases of legal monopolies, such as a patent, copyright, trade mark, etc. For instance, questions of revenue, of facility of transport, of supply of public conveniences—these are matters that pertain to all governmental or municipal monopolies, but are comparatively foreign to a treatment of legal monopolies. The leading examples of municipal monopolies are drainage works, water supply, gas and electric light supply, telephones, tramways, street-railways and the like. The interests of the people are so intimately connected with all these that public control, whether partial or complete according to circumstances, is thought to be just and desirable. The problem of municipal monopolies is really confined to the respective merits of two plans—the plan of public ownership and the plan of private ownership with varying degrees of public control. But an out-and-out policy of *laissez faire*, however beneficial it may be in the ordinary fields of commercial activity, is generally admitted to be not adaptable to municipal monopolies.

State or Governmental monopolies are mainly based on fiscal grounds.

So in the case of state or governmental monopolies. They arise from practical considerations of great weight, and it is generally conceded that at least those state monopolies which are based on fiscal considerations are justified, even though they necessarily involve a sacrifice of the let-alone policy.

Excepting legal, customary and contractual, the principal monopolies in British India are Governmental.

In British India, with the exception of the legal, customary, contractual, and municipal monopolies above indicated, the principal monopolies have been the monopolies exercised and maintained by the Government. They have come down from the days of the East India Company. As early as 1769 the Directors of the East India Company directed that silk-winders should be made to work in the Company's factories and prohibited from working outside "under severe penalties by the authority of the Government."¹ We find from the Ninth Report of the Select Committee of the House of Commons (1783) that the great and valuable articles of the Company's

Monopolies under the East India Company.

¹ General Letter dated 17th March, 1769, quoted in R. C. Dutt's 'Economic History of British India,' p. 256.

Investment¹ were raw silk and various descriptions of piecegoods made of silk and cotton. "These articles are not under any formal monopoly; nor does the Company at present exercise a declared right of pre-emption with regard to them. But it does not appear that the trade in these particulars is, or can be, perfectly free. * * * * * For the present trade, even in these articles, is built from the ruins of old monopolies and pre-emptions, and necessarily partakes of the nature of its materials."² The preamble to Regulation 31 of 1793 sets forth in detail the extent of state control over production exercised at this time in respect of the different articles of the Company's Investment.³

Monopoly in raw silk and various piecegoods.

—built from ruins of old monopolies.

Amongst fiscal monopolies in India, or monopolies conducted with a view to revenue, salt and opium occupy a conspicuous place.⁴ "The manufacture of opium and salt," said Holt Mackenzie, who was one of the principal witnesses examined by the Common's Committee in 1832, "is conducted with a view to revenue, not trade. My opinion is that, of the suggested changes with regard to those articles, there is none that would not involve a large loss of revenue. In the salt department, I do not think we could by any means of an excise, collect the same amount of net revenue as is yielded by the public sales. * * * From that source also (opium) they derive a very large revenue, the excess of the sale prices beyond the first cost constituting such a tax as I would think it hopeless to get by any other device; and though, commercially speaking, there are strong objections to the system, yet we must set against that the necessity

Fiscal monopolies in British India—Salt and Opium.

¹ By this term was evidently meant the business of the Company where by the revenues of the country were *invested* in the purchase of Indian goods for exportation and sale in Europe.

² Ninth Report of the Select Committee of the House of Commons (1783), p. 23, quoted in Harrington's 'Analysis,' Vol. III, p. 595.

³ See John Herbert Harrington's 'An Analysis of the Laws and Regulations enacted by the Governor-General in Council at Fort William in Bengal,' Vol. III, p. 595.

⁴ A similar monopoly in opium, salt and camphor exists in Formosa, the Japanese dependency. The first is defended on moral and economic grounds, but all the three are a source of substantial revenue to the Japanese Government. There is also a very successful state monopoly in Japan in the cultivation of the tobacco-leaf. In respect of the last, however, Austria perhaps leads the way—the tobacco monopoly of the Austrian Government being considered the most successful, from the point of view of the State as well as that of the consumer.

of the revenue; and my belief is that the same amount of revenue cannot be otherwise got.”¹

History of the
opium monopoly.

Under the Muham-
madan rulers.

Under Warren
Hastings.

The desirability of
continuing the
monopoly ques-
tioned in 1775.

View of the major-
ity of the Mem-
bers of the Council
—recommending
continuance.

The history of the opium monopoly in India is an interesting one. The right to produce opium in Bengal was farmed by the Muhammadan rulers who preceded the East India Company and this method was adopted by Warren Hastings on behalf of the East India Company in 1773.² About the year 1775, the question arose as to whether the manufacture and sale of opium should remain the exclusive privilege of the Company or the trade in it be thrown open, subject to a duty. The Court of Directors³ took a very liberal view of the position and directed that if the Governor and Council should “be of opinion that abolishing the monopoly of opium will contribute in any great degree to the relief of the natives” they were authorised “to give up that commodity as an article of commerce; only fixing and reserving a reasonable duty thereon to the Company,” and such duty, it was thought, should not exceed Rs. 30 per maund. Mr. Francis, Member of Council, contended for the abolition of this and all other monopolies as “anti-commercial in the first instance and ultimately destructive of revenue.”⁴ But the majority of the Members took a different view and held that, taking all the circumstances into consideration, a continuance of monopoly on behalf of the Company was expedient. The monopoly has since been maintained accordingly. One of the arguments put forward for its continuance is based on moral grounds, and it is contended that if it be just and advisable in any case to monopolise for the benefit of Government the growth, manufacture or sale of an article of internal produce, a pernicious drug like opium which is neither a necessary of life nor even a desirable superfluity, must be an unexceptionable subject of exclusive privilege. Besides, if not adulterated (as it might be in the hands of

¹ Quoted in R. C. Dutt's 'Economic History of British India,' pp. 287-288.

² Imperial Gazetteer (1907 Edition), Vol. IV, p. 242.

³ See their General Letter dated 24th December, 1776, para 77. *Vide* Harrington's 'Analysis,' Vol. III, p. 654.

⁴ See Ninth Report of the Select Committee 1793, under head of 'Opium' and App. No. 62; also Mr. Francis' 'Plan of Settlement' printed in App. 14 to the Committee's Sixth Report; referred to in Harrington's 'Analysis,' Vol. III, p. 655.

individuals) it would be a valuable commodity for external commerce. Therefore, it should be brought under state control and made an instrument of raising revenue.¹

The system of farming was, however, found to give rise to deterioration of the product and to oppression of the cultivators by the contractors. Accordingly in 1797 the Bengal Government assumed the direct monopoly of manufacture. In the year 1893 a Royal Commission was appointed to inquire into the extent and effects of opium consumption in India, and to consider whether the production and sale of the drug except for medicinal purposes only should be prohibited. The result was that they recommended the maintenance of the Bengal monopoly system of production.

The system of farming found inconvenient.

In 1797, Government assumed direct monopoly of the manufacture.

The next important article of governmental monopoly in India is salt. Lord Clive observed that "the salt trade in Bengal had (before the Company's administration) been a monopoly time immemorial; that it ever was and must be a monopoly and that Coja Wajid and other merchants long before him, had given to the Nabob and his ministers two hundred thousand pounds per annum for the exclusive privilege."² Whatever may have been the extent and character of the monopoly of salt under the Muhammadan rulers, this at any rate is certain, that at the very commencement of the Dewanny grant in August 1765, a plan was adopted for engrossing the entire purchase, in the first instance not only of salt, but of 'all salt, beetle-nut

History of the salt monopoly.

"Salt trade a monopoly time immemorial"—Lord Clive.

Monopoly of salt, beetle-nut and tobacco at the Dewanny grant in 1705.

¹ The following extract is from Mr. H. Colebrooke's Remarks, etc., printed at Calcutta in 1804: "Opium, it is well known, has been monopolised by Government. It is provided in the provinces of Behar and Benares, and sold in Calcutta by public sale. For many reasons this monopoly seems less exceptionable than any other. It is doubtless a national object of policy to discourage the internal consumption of a drug, which is so highly pernicious, when employed for intoxication. It must not, however, be concealed, that, by the effect of the monopoly, Behar has lost the market of the Western countries, which formerly were thence supplied; but which now raise as much as is consumed within their limits; and even furnish some opium to the British provinces. * * * * The facility of adulterating opium, and the consequent necessity of precautions against such frauds are circumstances which would justify the monopoly, were it even objectionable on other considerations. In a free commerce, the quality might probably be more debased, to the injury of export trade." Chap. V, pp. 110 and 114; cited in Harrington, Vol. III, p. 656.

² See Ninth Report of the Select Committee of the House of Commons, 1783, p. 43; cited in Harrington's 'Analysis,' Vol. III, p. 658.

Disapproved by
Court of Directors
in 1768.
Salt manufacture
thrown open to
the public.

Act of 1773.

Monopoly again.

History of the
saltpetre
monopoly.

Under the Subah-
dars.

Under the East
India Company.

1. Anne. Cap. 12.

and tobacco produced in and imported into Bengal' for the benefit of the Company's servants.¹ This was subsequently disapproved by the Court of Directors and, in pursuance of their orders, the monopoly was abolished in 1768 and the salt manufacture and trade was thrown open to the public. In 1773, an Act of the legislature was passed whereby it was provided that it should not be lawful for any of his Majesty's subjects to engage, intermeddle or be in any way concerned, directly or indirectly, in the inland trade in salt, beetle-nut, tobacco or rice except on account of the United Company." In fact, however, before this Act came into force the salt manufacture and trade were in the year 1772 again monopolised, for the benefit of the Company, on the declared ground "that no new hardships would be imposed upon the salt manufacturers, by taking the management of that article into the hands of Government; the only difference being that the profit, which was before reaped by the English gentlemen and their banians, would be now acquired by the Company."² From the year above mentioned up till now, a monopoly of salt under varying modes of conducting it has been continued for the benefit of Government.

The next important article of monopoly under the East India Company was saltpetre. The exclusive privilege of saltpetre trade was granted by the Subahdars as a matter of favour to different persons. Before the establishment of the English influence it could only be bought from the manufacturer in the first instance by those persons who were allowed to trade in it; and all other persons must purchase from them.

Under the East India Company the system adopted was that the whole quantity of saltpetre produced in the province of Behar was brought into the Company's factories, and certain established prices allowed for it; and no other persons whatever were permitted to trade in the article. The Company were bound by an Act of Parliament (1 Ann. Cap. 12 § 112

¹ See Ninth Report of the Select Committee 1783, under head of 'Salt'; see also Regulations for carrying on the inland trade in salt, beetle-nut, and tobacco, passed 10th August 1765, in Colebrooke's 'Digest,' Vol. III, p. 375; referred to in Harrington's 'Analysis,' Vol. III, 661.

² Ninth Report of the Select Committee, 1783. Harrington's 'Analysis,' Vol. III, p. 661.

to § 114) to deliver annually, if demanded, into His Majesty's stores a certain quantity of saltpetre at certain specified rates. This probably operated in keeping up a virtual monopoly of saltpetre in the hands of the Company. Then followed Regulation 8 of 1812 declaring the manufacture of saltpetre to be a monopoly on the part of Government; preventing illicit manufacture of saltpetre; and regulating the conduct of the agents, and all persons employed in the provision of that article, in the provinces of Bengal, Behar, Orissa and Benares. The monopoly was abolished on the 11th March, 1814, by Regulation 4 of that year.

Reg. 8, 1812.

Monopoly
abolished 11th
March, 1814.

Of State monopolies, the production and sale of intoxicating liquors has always held a conspicuous place in some western countries. It is one of the essentially fiscal monopolies, although it is also justified on moral grounds inasmuch as it serves as a guarantee of the quantity and quality of the article consumed. In respect of the monopolisation of alcohol, Switzerland stands pre-eminent—the moral object of the monopoly being the popularisation of light beers and wines in preference to spirits. The monopoly is in part federal, in part cantonal, and in part municipal; and the annual net profit since the establishment of the monopoly has been considerable. The Gothenburg system in Sweden has proved equally profitable and equally beneficial to the people.

State monopoly
in intoxicating
liquors—
essentially fiscal,
although justifiable
on other grounds
as well.

In Switzerland.

In Sweden.

The same can hardly be asserted with confidence about the liquor trade in India. But it is undoubtedly a source of revenue to the Indian Government and is calculated to a very large extent to exercise a wholesome check on the consumption of alcohol in India. Under the Moghul Emperors the system of excise (*Abkari*) generally in force was one of farming, the right of manufacture and sale being given to the highest bidder. Under the British administration, at first, this farming system was continued. With the double object of checking the immoderate use of spirituous or fermented liquors and intoxicating drugs and of augmenting the public revenue, successive rules, orders and regulations were passed.¹ The first step was the

In India

Abkari—under the
Moghul Emperors.

Under British
administration.

¹ In 1790, in 1791; in 1792, Regulation 34 of 1793; Regulation 47 of 1795 Regulation 6 of 1800 amending the original rules for the purpose of

The out-still
system.

The central
distillery system.

Manufacture and
sale of hemp-drugs
—under strict state
control.

Abkari—not
directly within the
purview of our
subject.

Railways, an
instance of govern-
mental monopolies.

Should Railways be
company-owned or
State-owned ?

Proportion of
state-owned to
company-owned
railways in the
world—
U.S.A.

limitation of the number of shops in the area farmed. Next, was established the so-called out-still system whereby individual licensees were allowed to distil liquor at their own shop premises and sell it at pleasure. This is what prevailed for a long time in Bengal, Behar and Orissa. But the evils of the out-still system were that it allowed individuals to produce an unlimited quantity of inferior stuff, lower the prices, and thus encourage the practice of drinking. This system is now gradually being replaced by the central distillery system, in which the manufacture and storage are under Government supervision, and the liquor pays a still-head duty before issue.

A system of *abkari* with necessary variations in details is followed in the case of hemp-drugs such as *ganja*, *charas* and *bhang*, and all these are carried on under more or less stringent state control, one of the objects of such control being to keep the consumption of the commodities in question within reasonable limits. Although, however, *abkari* comes indirectly into our discussion, as making for monopoly of a sort (in the sense of state-controlled industry), I do not propose to discuss it in detail as it does not come directly within the purview of our subject.

The case of railways affords another instance of governmental monopolies. The question as to whether railways should be company-owned or state-owned has long been mooted ; and opinion is still divided on the subject. But some are of opinion that the State should take over, consolidate and operate as one great undertaking the entire railway system of each country as it already does with the Post Office, the telegraph and other allied services. A survey of the world's railways shows that the proportion of state-owned to company-owned railways varies in a remarkable manner. Thus in the United States and, general-

more effectually carrying out the original objects of the *abkari* tax "by enhancing the price to the consumer" as well as by giving the Magistrates a more immediate and efficient control over the conduct of the vendors. On the 21st August, 1813, Regulation 10 of that year was enacted for reducing to one regulation, with alterations and amendments, the regulations in force respecting the manufacture and sale of spirituous liquors, intoxicating drugs, *taury* and *putchwy* (*Taury* or *Toddy* is juice from the palm tree, fermented, or similar juice from the date tree and, in some parts of Southern India, from the cocoanut tree. *Putchwy* or *Puchoosee*, is composed of boiled rice, mixed with various drugs ; and prepared by a fermenting process for intoxication). See Harrington's 'Analysis,' Vol. III, p. 177.

ly, in the American Continent company-ownership is paramount. The conditions in Australasia are just the reverse, the state-owned railways being over 90 per cent. In Europe, there is only a slight excess in favour of state-owned over company-owned railways. In British India there is a considerable amount of State Railways, e.g. the North-Western Railway, the Oudh and Rohilkhund Railway, the Eastern Bengal Railway, and so on. But there is quite a large quantity of railway in the land which is run by companies such as the East Indian Railway, the Great Indian Peninsular Railway, the Bombay, Baroda and Central India Railway and the like. As matters stand at present, it is on State agency and on private enterprise under State control that India has to depend for the construction of new railways. The railways in India thus present a variety of different kinds of management. Some are directly undertaken and managed by Government or Native States, others are owned by Government or Native States, but managed by companies, the rest exclusively company-owned and company-managed. Concessions are granted by the Government of India for the construction of branch lines forming feeders to State lines. No concession can be granted for the construction of a branch line until the line has been surveyed and detailed estimates of its cost, and an adequate report on its traffic prospects, have been prepared by an agency approved by the Government of India. The concession granted is in the shape of financial assistance to approved companies either by way of a guarantee of interest or of a rebate to the branch line company from the net earnings of the main line from traffic interchanged with the branch.¹

Australasia.

Europe.

British India.

Railways in India present a great variety in modes of management.

Concessions granted by Government for construction of branch lines.

CLASSIFICATION OF MONOPOLIES.

Now that we have briefly surveyed the different types of monopoly that present themselves to an ordinary observer, we are perhaps in a position to analyse them a little further and proceed to classify them. Strictly speaking, the work of classification

¹ See Resolution No. 457 R.P. of 1913 modified by Resolution No. 969 R.P. of 1914. Railway Administration Report.

ought to come last, for you have to know a thing well before you can label it and classify it. At the same time, a tentative process of classification helps the understanding of a subject, and saves one from confusion among all its details. Monopolies have been classified differently by various authors and, I almost think, the work of classification has been done too much so that at times reality has been sacrificed to subtlety. Most of these classifications proceed from the economic point of view. With us, happily, the work is much simpler as we have to proceed upon a broader basis and take only the main types as they present themselves to the jurist, and seek to classify them for purposes of convenience and clearness of thought.

Classification by
Prof. Jenks into
Natural, Legal and
Capitalistic—
discussed

The classification incidentally adopted so far and indicated at the beginning of this lecture is the one adopted by Prof. J. W. Jenks¹. He divides monopolies into three main classes, viz. Natural, Legal, and Capitalistic Monopolies. The first class includes such businesses as railways, tramways, gas, drainage and other similar works, as also the working of such minerals as can be found only in specific areas, in other words, all businesses which owe their existence and success to favourable natural arrangements of soil or situation. As to natural ability in the sense of personal aptitude and the like, Prof. Jenks touches upon the subject, but does not sufficiently develop it; nor does he indicate the monopolies which spring out of special mental equipments on the part of individuals. But we may take it that they are implied by him, and evidently go under the class of Natural monopolies. The Legal monopolies include Patents, Copyright, Trademarks, etc., but, I presume, they would, properly speaking, also include the municipal and governmental monopolies (whether based on fiscal considerations or otherwise) discussed in the earlier portion of this lecture. Lastly, the Capitalistic Monopolies include all the monopolistic combinations which depend on various factors briefly indicated in the last lecture, viz. combination of large masses of capital, business ability and the like, resulting in the absolute or partial

¹ See his suggestive article in Palgrave's Dictionary of Political Economy headed 'Monopolies in the United States.'

concentration of business in a particular commodity in the hands of one or more persons. The word 'Capitalistic' has been objected to on the ground that the prevailing or paramount feature of such monopolies is not the mass of capital involved, but the combination or unification of action which they present.¹ It can scarcely be doubted, however, that the mass of capital employed is an invariably potent factor in the case of all such monopolistic combinations, and in that view the nomenclature can hardly be called inaccurate.

Objection to the term 'Capitalistic'—discussed.

A classification somewhat on the same lines, but rather improved in some respects, is offered by Dr. Charles J. Bullock in his 'Introduction to the Study of Economics.' He classifies as follows:—

Dr. Bullock's classification—discussed.

- A. Monopolies of Personal Abilities.
- B. Legal Monopolies.
 - I. Private Monopolies, such as patents, copy-right, etc.
 - II. Public Monopolies, such as the postal business of modern countries. (Herein would be included the public consumption monopolies, and the fiscal monopolies; and, perhaps, also the railway monopolies under State control. But these last go under Natural Monopolies as well, and are placed by Dr. Bullock in that class).
- C. Natural Monopolies.
 - I. Monopolies of location, such as the monopoly of anthracite coal.
 - II. Monopolies due to consumption of products in connection with the plants, such as gas and electric light works and railways.
- D. Capitalistic Monopolies, such as agreements, pools, the former 'Trusts' and the vast corporations which now replace the 'Trusts'.²

A very ingenious and comprehensive classification of monopolies for our purposes is that offered by Prof.

Prof. Ely's classification—discussed

¹ See § 5, Lecture I.

² See Lectures XI, XII.

Ely in his luminous little book, 'Monopolies and Trusts.' He suggests several modes of classification¹ of which I shall take, first of all, the following:—

A. SOCIAL MONOPOLIES. These are subdivided into:—

I. General Welfare Monopolies.

1. Patents.
2. Copyrights.
3. Public Consumption Monopolies.
4. Trade-marks.
5. Fiscal Monopolies.

II. Special Privilege Monopolies.

1. Those based on Public Favouritism.
2. Those based on Private Favouritism.

B. NATURAL MONOPOLIES. These, again, are subdivided into:—

- I. Those arising from a limited supply of raw material.
- II. Those arising from properties inherent in the business.
- III. Those arising from secrecy.

The term 'Social monopolies'—
explained.

It is to be observed that the class called Social Monopolies is comprehensive enough to include within it the so-called contractual monopolies and customary monopolies dealt with in the last lecture. "A Social Monopoly," observes Prof. Ely, "is a monopoly which arises out of social arrangements and is an expression of the will of society as a whole, through Government or of a section of society strong enough to impose its will on society. A Natural Monopoly, on the other hand, is a monopoly which rests back on natural arrangements as distinguished from social arrangements. The term 'Natural' here is used in its well-understood and customary sense, to indicate something external to man's mind. A natural monopoly is one which, so far from giving expression to the will of society, grows up apart from man's will and desire, as expressed socially, and frequently in direct opposition to his will and desire thus expressed."

¹ See 'Monopolies and Trusts' by Prof. Richard T. Ely, Chap. II.

A few words are necessary to explain the significance of the various heads or designations under which monopolies have been grouped in the last mentioned classification. So far as patents, copyrights and trade-marks are concerned the position is clear enough. It is not difficult to perceive that for the welfare of society and for the general encouragement of inventions it is expedient and proper that the legislature should grant to the first inventor an exclusive right to the fruits of his invention for a limited time. Thus the monopoly is a limited one in time, and after the lapse of the prescribed period the inventor loses his monopoly and it becomes public property. While, however, it is easy to see that there should be in the interests of public welfare a limited monopoly, such as the one above indicated, in the first inventors, it is not so easy to admit that the law as it stands now is perfectly fair and equitable to contemporaneous inventors. Inventions are after all social products and shape themselves to the needs and requirements of particular ages and climes. For instance, with the development of rapid transit agencies of all sorts, aviation as a new method of locomotion has made its appearance and in these days of aviation one may well expect all ingenious artificers and workmen to cast about and improvise new methods and new contrivances that may help forward and improve the art of aviation. Now suppose two men by the employment of such materials and ideas as have become the common property of all mechanics, and by their own independent exertion and skill, hit upon the same invention, but one of them is only a day or two ahead of the other. Who is to be entitled to the patent right? Is the one who comes a day or two later to be deprived of the privilege, although he really owes it to no one, but has evolved it out of his own imagination? Is time really of the essence of the right? One would think not, yet the patent system as it stands now can give us nothing better. 'First come, first served' is the principle on which it proceeds.

Prof. Ely's scheme fully discussed and criticised.

Place of patents in the scheme—discussed.

The case of copyright is simpler. Two men may hit upon the same invention, independently of each other. But two men cannot possibly chance upon the very same literary, artistic or musical composition.

Place of copyright in the scheme.

At any rate, the probabilities are much against such a thing happening. It is for this reason that some have contended in favour of a perpetual copyright monopoly. But it is obvious that the claim is based on an utter disregard of the right of society to its products, for, after all, whether it be mechanical invention, or literary, artistic or musical invention, it is pre-eminently a social product; and after the claims of the inventor or author are satisfied by means of a temporary monopoly the subject of such monopoly should become the property of the public at large. This question was thoroughly discussed in the case of *Millar v. Taylor*,¹ and Mr. Justice Yates observed:—“That every man is entitled to the fruits of his own labour I readily admit. But he can only be entitled to this, according to the fixed constitution of things, and subject to the general right of mankind and the general rules of property. He must not expect that these fruits shall be eternal, that he is to monopolise them to infinity; that every vegetation and increase shall be confined to himself alone and never revert to the common mass. In that case, the injustice would lie on the side of the monopolist who would thus exclude all the rest of mankind from enjoying the natural and social rights. The labours of an author have certainly a right to a reward, but it does not from thence follow that this reward is to be infinite and never to have an end.”

‘ Public consumption monopolies’—
explained and
illustrated.

The third sub-class, viz. public consumption monopolies, covers a variety of articles and may well be considered together with the fifth sub-class, viz. fiscal monopolies. The salt and opium monopoly of India; the opium, salt and camphor monopoly of Formosa; the tobacco monopoly of Austria; the tobacco leaf monopoly of Japan; the monopoly of alcohol in Switzerland; the partial monopoly or *abkari* system of India—all these may be mentioned as making for public welfare in regard to consumption of necessities or luxuries. But the majority of them turn more on fiscal than on any other consideration. Regarding the opium or alcohol monopoly, for instance, or the many other intoxicating drugs that come within the

¹ 4 Burr 2303, at p. 2359. S.C. 98 Eng. Rep. 201.

abkari regulations of the Government of British India, if the moralist had his way altogether, the use of the articles would be placed under prohibition, except for medical purposes. On the other hand, an article like salt would have been made much more accessible than it is at present. The State in these instances has to content itself with a qualified ideal of public welfare; and is powerfully influenced by questions of revenue. Thus referring to the opium monopoly created by the Japanese Government in its dependency of Formosa, Mr. Francis W. Hirst in his little book quotes from Dr. Shimpi Goto, the Civil Governor, who observes that the habit of smoking opium is pernicious and that it was therefore decided to abolish the practice by degrees: "When the Japanese took possession of Formosa they found there a population more or less addicted to the use of the drug." "Only those who were already addicted to the use of the drug to the extent that it occasioned them intense pain to deprive them of the pipe are now permitted by a special warrant, which they are obliged to procure, to continue its use. To commence opium smoking is strictly forbidden, or even to continue its use, unless it can be shown that abstention is impossible. The Government monopoly of the article was expressly established to facilitate the final extinction of the opium habit." Mr. Hirst then pertinently observes: "This sounds highly satisfactory. But it is rather alarming to learn that the revenue derived from so very virtuous a monopoly amounts at present (1904) to about £4,000,000 a year. The inhabitants of Formosa number less than 3,000,000"!

The essence of a trade-mark right is the reputed association in the market of the particular symbol or mark or the particular trade-name with the goods of a particular trader. Such mark or name comes to stand for the quality of the goods in question. If any one uses the particular mark or name, he thereby represents his goods as the goods of the particular trader or as possessing some connection with him which the goods in fact do not possess. Thus the public is deceived and there is a wrong committed in respect of which the trader has a cause of action against any person who is responsible for the deception. The lead-

Place of trade-marks in the scheme.

ing principle as stated by James, L.J. in the case of *Singar Manufacturing Co. v. Loog*¹ is as follows :—“No man is entitled to represent his goods as being the goods of another man ; and no man is permitted to use any mark, sign or symbol, device or other means, whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie, or to make a false representation to somebody else who is the ultimate customer. That being, as it appears to me, a comprehensive statement of what the law is upon the question of trade-mark or trade-designation, I am of opinion that there is no such thing as a monopoly or a property in the nature of a copyright, or in the nature of a patent, in the use of any name. Whatever name is used to designate goods, anybody may use that name to designate goods ; always subject to this, that he must not as I said, make, directly or through the medium of another person, a false representation that his goods are the goods of another person.” The right of property in trade-marks was further established by the decision of Lord Cottenham in *Millington v. Fox*² where it was held that an injunction could be obtained to restrain infringement of a trade-mark, even though the infringement was due to ignorance, and was without fraudulent intent.

Customary and contractual monopolies would naturally come under the general welfare monopolies.

The customary and contractual monopolies mentioned in the last lecture do not appear anywhere in the classification above offered. They, however, come naturally under general welfare monopolies, for the main principle on which they rest is public policy or public welfare.³

Special Privilege monopolies.

The second class under Social Monopolies is called Special Privilege Monopolies or those which owe their origin to the arbitrary favour or patronage of the sovereign, or some authority in whose hands lies the gift of the power or privilege. The old monopolies established in England were of this class. The exclusive right anciently given to the Universities of Oxford and Cambridge of printing and publishing almanacs, the monopoly given to the East India Company,

Illustrations.

¹ 18 Ch. D. 395 at p. 412 ; 52 L.J. Ch. 481 (1880).

² 3 My. and Cr. 338.

³ See Lecture I.

monopolies founded on protective tariff are illustrations of Special Privilege Monopolies, based on public favouritism. They have been discussed in detail in the last lecture and I do not propose to deal with them any further in the present. Those based on private favouritism are more often to be found in present-day economic conditions. The favouritism of the railways is a conspicuous instance. A study of the conditions under which the so-called modern 'Trusts' flourish reveals the undoubted fact that a good many of the Trusts derive their origin and success not so much to concentration of capital, or organisation of business ability, as to the securing of advantageous freight rates from Railway companies, with the result that they succeed in delivering the article to the wholesale dealer at his place of business at a much lower price than is possible to any other producer in the field.¹ The conditions above referred to are no doubt highly artificial. No less artificial are the monopolies which are fostered by a system of preferential tariff. Mr. Havemeyer has observed that tariff is the mother of trusts. There are at the present day in America many great trusts whose connection with the tariff has never been denied. The United States Steel Corporation (with its constituent companies such as the American Plate Company), the American Sugar Refining Company, the Beef Trust, the National Cash Register Company, the International Harvester Company, the International Paper Company and the American Woollen Company are well-known illustrations of the intimate connection between tariff and Trusts. A protective tariff is supposed to foster an infant industry by protecting it from the effects of unequal competition with a powerful rival. The common case is that of an unsuccessful industry complaining of foreign competition and a paternal government promptly adding a clause to the tariff placing a stiff duty upon the foreign article. This, of course, safeguards the industry in question from the encroachments of foreign competition. But at the same time, it encourages other producers in the country to enter the field, thereby keeping up the competition although in another form. This leads to combina-

¹ See Lectures XI and XII.

tion as the next most inevitable step. One of the leading firms of producers hits upon the happy idea of combining with some other and thereby killing competition and avoiding the lowering of prices which competition brings in its train. Thus the tariff, by excluding foreign industry, artificially limits the field of competition and, again, by encouraging home competition imperceptibly leads the way to the formation of Trusts and combinations. This, however, is not invariably so. In certain cases the industry in question is sheltered from foreign competition not by a tariff but by natural advantages. This leads us to the next class.

Social monopolies due to artificial conditions—hence often called ‘artificial monopolies.’

It will have been noticed that the monopolies coming under the designation social monopolies are all due more or less to artificial conditions. In fact, social monopolies are often called ‘artificial’ monopolies. For my part, I am inclined to think that ‘artificial’ is a happier name, and is also a more suitable antithesis to the word “natural.” Certain writers like Prof. Ely, however, prefer the term ‘social’ to ‘artificial’ on the ground that the latter carries with it a certain criticism and almost savours of reproach. Whatever may be said about the first group, so far as the second group is concerned the term ‘natural monopolies’ is about the most appropriate which has been applied, and has also received very wide acceptance. Illustrations of the first sub-class, viz. monopolies arising from a limited supply of the raw material, may be found in the business in anthracite coal in America. The secret of the monopoly is to be found in the fact that the supply of anthracite coal is limited only to one section of Pennsylvania. The oil business in America furnishes another instance. The business of refining oil first became a monopoly. The production of crude oil also soon became a monopoly owing to the fact that the oil was to be found only in limited geographical areas.¹ It is difficult to give similar instances in India.

Monopolies arising from inherent properties of business.

The next class, namely the monopolies arising from properties inherent in the business, include railways, canals, postal service, the telegraph and the tele-

¹ See Lectures XI and XII.

phone, docks, light-houses, local rapid transit agencies, gas-works, water-works, etc., and other enterprises and businesses of a like nature.¹

Lastly, monopolies arising from secrecy. Secret processes are an important source of monopoly. A special recipe for dying, or tanning, a special process of tempering steel, or a special prescription for hydrophobia or malaria, has formed the basis of a most lucrative monopoly. The object of the law of patents is to do away with such secrecy by giving the first inventor a limited protection for a specified period and thereafter making the secret process the property of the public. But notwithstanding patent laws the practice of keeping processes secret is most extensively followed in all departments of arts and industries. In India, it is common knowledge that a secret is very often kept within a family circle and handed down from generation to generation.

Monopolies arising from secrecy.

Various other classifications have been suggested. But having regard to the special object of classification we have in view for the purposes of these lectures, a detailed discussion of these methods of classification is scarcely necessary.

¹ The following passage from Prof. Ely's Monograph entitled 'Monopolies and Trusts' will repay perusal:—"The chief characteristics of natural monopolies of this kind are these: first, that the service or commodity makes use of certain peculiarly favoured spots or lines of lands; secondly, that it is furnished in connection with the plant itself—railway service, for example, cannot be shipped but must be used in connection with the plant—if it could be shipped as flour can be then we would have a different result; and thirdly, that the returns are in accordance with the law of increasing returns—the greater the output the larger the return. The latter produces an inevitable tendency to monopoly. The cheaper the rate at which an increasing output can be furnished the greater is the tendency to monopoly, because wherever two competitors unite, they can furnish the service or commodity more cheaply and, consequently, there is always a gain; in the case of street railways, for example, there is a very decided gain, which is the inducement to combination.

LECTURE III.

HISTORY OF MONOPOLIES.

§ I. ANCIENT MONOPOLIES.

Growth of modern
monopolies.

The modern monopolies are the direct outcome of modern conditions of industry. We hear of attempts at a world monopoly, although hitherto they have met with partial success. Such a thing was unheard of in ancient times, the conditions of life were so different and the means of transportation by sea and land so slow and uncertain. Steam and electricity and the rapid transit agencies which they have brought in their train have revolutionised the world, infinitely expanded the sphere of our activities and affected the magnitude of our undertakings. The change effected by these improvements in the realm of monopolies is no less remarkable. We now speak of 'Trusts' and 'Combinations' and look upon their prodigious proportions as almost in the nature of commonplaces. In the olden times, the only considerable monopolies that existed were governmental or state monopolies. Thus we read of royal monopolies of brick, syenite and papyrus in Egypt, of royal monopolies of wheat and purple among the Phoenicians. In ancient Greece and Rome there were also various state monopolies; as, for instance, monopolies of lead mines and of banking in Greece, the monopoly of salt in Rome. In the ancient books of India we find reference in distinct terms to royal monopolies. Thus we find in the code of Manu, "Let the king confiscate the whole property of a trader who out of greed exports goods of which the king has a monopoly or the export of which is forbidden."¹ Medhatithi, the learned commentator of Manu, gives as instances of monopolies, elephants, saffron in Kashmir,² fine cloth and wool in the east; horse in the west, precious stones and pearls in the south. In Vajnavalkya we find a reference to

Character of
ancient
monopolies.

¹ Manu VIII, verse 399.

² It is interesting to note that saffron is still a royal monopoly in Kashmir.

royal monopolies in the following verse: "The king shall take as a tax a twentieth share of the price of a commodity fixed by him. A thing specially ordered to be reserved by or worthy of a king shall, if sold to a stranger, belong to a king." Again during the reign of Chandra Gupta, the founder of the Maurya dynasty, ship-building, which was quite a flourishing industry, was in the hands of the State and was a Government monopoly. Speaking of ship-builders Megasthenes observes that they were salaried public servants and were not permitted to work for any private person.¹

It would scarcely be true, however, to say that royal monopolies were the only ones in the world, although they were no doubt the most considerable monopolies. But others could easily be mentioned. For instance, there was that much-hated class of monopolists known to us under the scriptural designation of "publicans and sinners"—the farmers of revenue who enjoyed the exclusive privilege of collecting taxes, a privilege which they often abused by levying blackmail in the tracts coming within their jurisdiction. Apart from these and other minor monopolies, there were, of course, as there must be in all ages and climes, natural monopolies springing from some special advantages, mental or material, of some sort or other. Thus if Tyre and Sidon enjoyed exclusive privileges of trade in the Black Sea and the Mediterranean, it was because they had a natural aptitude, pre-eminent in that age, for commerce and trade and made themselves conspicuous for commercial enterprise across the seas. There is enough evidence in ancient and mediaeval history of organized attempts at monopoly of food-stuffs, and also of steps taken by individuals and the State to counteract them. Witness the proverb, "He that withholdeth corn the people shall curse him but blessing shall be upon the head of him that selleth." This seems to point to the existence of a phenomenon which in mediaeval phraseology would be called 'Ingrossing' and which perhaps is the prototype of our modern 'Corner.'²

Other monopolies
in ancient times
besides State
monopolies.

¹ Strabo XV, 46 The ship-builders received wages and provisions from the king for whom alone they worked.

² See *infra*. See also Le Rossignol's 'Monopolies Past and Present,' p. 26.

In Athens there appears to have been a strong feeling against similar manipulations by grain-factors who used to buy up grain from the ships at the Piraeus and sell it in Athens at high prices, which they secured by combination amongst themselves. The public feeling led the State to intervene and laws were passed with the object of controlling prices and profits. Officers were appointed whose duty was to supervise the grain trade in Athens and the Piraeus and to conduct an inspection of bread and meat. And yet the mischief was, as it always has been, hard to combat. Listen to what Lysias, the orator, says in denunciation of the methods of corn-factors of his time, and you will at once realise that history does repeat itself. He says, "They buy up grain, under the pretence of caring for the public welfare or of having a commission from the Magistrates. But when a war-tax is imposed their pretended public spirit is not maintained. They gain by the public calamities. They are so well-pleased with them that they have the first news of them or invent news, as for instance, that the ships in the Pontus have been taken or destroyed, that ports are closed, that treaties are revoked. Even when the enemy are quiet they harass the citizens by accumulating grain in their storehouses, and by refusing to sell in time of the greatest scarcity in order that the citizens may not dispute with them about the price, but may be glad to procure grain at any price. In the case of other criminals, ye have to learn their offence from the accusers, but the wickedness of these men ye all know. If then ye condemn them ye will act justly and make corn cheaper, but, if not, dearer."¹ Evidently the tactics of the grain-dealers of those times do not differ much in principle from the manipulations of various classes of modern traders through a press too often addicted to sensationalism. For another illustration of prohibitions of monopolies in the ancient world take the following translation of an Edict of Zeno, Emperor of the East, issued to the Praetorian Prefect of Constantinople. "We command that no one may presume to exercise a monopoly of any kind of clothing, or of fish, or of any other

¹ Quoted in Le Rossignol's 'Monopolies Past and Present,' pp. 27-28.

thing serving for food, or for any other use whatever its nature may be, either of his own authority or under a receipt of an Emperor already procured or that may hereafter be procured, or under an Imperial Decree, or under a receipt signed by Our Majesty; nor may any persons combine or agree in unlawful meetings that different kinds of merchandise may not be sold at less price than they may have agreed upon among themselves. Workmen and contractors for buildings, and all who practise other professions and contractors for baths, are entirely prohibited from agreeing together that no one may complete a work contracted for by another, or that a person may prevent one who has contracted for a work from finishing it; full liberty is given to anyone to finish a work begun and abandoned by another without apprehension of loss, and to denounce all acts of this kind without fear and without costs, and if any shall presume to practise a monopoly let his property be forfeited and himself condemned to perpetual exile. And in regard to the principals of other professions, if they shall venture in the future to fix a price upon their merchandise, and to bind themselves by agreements not to sell at a lower price, let them be condemned to pay forty pounds of gold if it shall happen through avarice, negligence or any other misconduct, the provisions of this salutary constitution for the prohibition of monopolies and agreements among the different bodies of merchants shall not be carried into effect."

In India, as early as the days of Manu and Yajnavalkya, the question as to the propriety of traders combining for the purpose of putting up prices received marked attention. In Yajnavalkya, for instance, we find the following:—"For traders combining to maintain a price to the prejudice of labour and artisans, although knowing the rise or fall of prices, the fine shall be the highest amercement."¹ On this the Mitakshara aptly comments, "Although know-

Monopolies of traders in ancient India.

Manu and Yajnavalkya.

The Mitakshara.

¹ Yajnavalkya Book II, verse 252.

the washerman and others, or the artisans such as painters and sculptors, they shall be fined 1000 *panas*." In the next verse Yajnavalkya continues, "For traders combining to obstruct the sale of a commodity by demanding a wrong price, or for selling it, the fine laid down is the highest amercement." The comment of Mitakshara on this is, "Moreover, those traders who, combining together, obstruct the sale of a commodity arrived from a foreign country, by demanding it at a wrong price, i.e., at a lower value, or sell it at a higher price, the highest amercement or fine for these has been laid down by Manu and others." But the next verse conveys a most interesting piece of information which throws a light even on present-day problems as to regulation of prices. Says Yajnavalkya, "The sale or purchase should be conducted at the price which is fixed by the king; the surplus made therefrom is understood to be the legal profit of traders." In Manu too there is a similar rule laid down with regard to the fixing of prices of commodities by the king. "Once in every five nights," says he, "or at the close of each fortnight, the king shall settle the prices in the presence of these, the traders."¹

Power of kings in ancient India to regulate prices

The above extracts from the Institutes of Manu and from Yajnavalkya, with the comment of Mitakshara thereon, clearly indicate that the Hindu law condemned any attempt on the part of traders to monopolise, i.e., to control the market for any given product and, consequently, to enhance its prices by combination amongst themselves. They are also of interest to the students of historical jurisprudence inasmuch as they show that in ancient times the Hindu kings had the power to regulate the prices of commodities, and that there was no constitutional limitation on such power.²

§ 2. MONOPOLIES OF FOOD-STUFFS.

Monopolies of food-stuffs in the Middle Ages.

Turning to the Middle Ages we find that the practice of buying up food-stuffs and other necessities of

¹ Institutes of Manu, Chap. VIII, verse 402.

² Cf the American view regarding the right of Government to regulate prices. *Vide* Tiedeman's 'State and Federal Control of Person and Property,' p. 302.

life at wholesale prices with a view to resell them at higher prices was quite a common one in England. The merchants or middlemen who adopted such business methods did not escape the kind attention of legislators. The practice of "Forestalling" or buying direct from the producers for future sale by the merchant or middleman, was looked upon as most iniquitous, inasmuch as it tended to deprive the consumer of his right of purchasing at the market direct from the producer. Hence it was put down as an offence against public trade. "This which * * * * is also an offence at common law was described by statute to be the buying or contracting for any merchandise or victual coming in the way to the market; or dissuading persons from bringing their food or provisions there; or persuading them to enhance the price when there; any of which practices make the market dear to the fair trader."¹

Forestalling
—explained.

The offences of forestalling, engrossing and regrating were kindred offences and were always dealt with as such. Thus Stephen in his 'History of the Criminal Law of England'² observes, "Forestalling, ingrossing and regrating was the offence of buying up large quantities of any article of commerce for the purpose of raising the price. The forestaller intercepted goods on their way to market and bought them up, so as to be able to command what price he chose when he got to the market. The ingrosser or regrater—for the two words had much the same meaning—was a person who having bought goods wholesale sold them again wholesale. This was regarded as a crime." It is doubtful if any very great discrimination was shown so far as the thirteenth or fourteenth centuries were concerned in the use of the three terms. But for purposes of greater accuracy it is best to know their exact significations. In Act 5 & 6 Edw. VI (1551-1552) a Forestaller is defined as "a person having goods or victuals *on their way to a market or port* or contracting to buy the same before they are actually brought for sale,³ or endeavouring by these and other means to enhance

Forestalling,
ingrossing and
regrating—
regarded as
offences.

Exact meaning
of each.

¹ Blackstone's Commentaries 160; Dane's Abridg. Ch. 205, Art. 2.

² C. 30, p. 199

³ An indictment for forestalling must charge expressly that the goods brought were "coming to the market to be sold" 1 Rol. Rep. 421.

the price or prevent the supply.” A Regrator is defined as a person buying corn or other victuals and reselling the same in the same market-place or in any other fair or market within four miles. An Ingrosser is defined as any one buying corn growing, or any other dead victual, with intent to resell the same again. Regrating must, therefore, be taken as the complete act embracing both forestalling and ingrossing, which were particular stages in the act. All these, however, point to practically the same practice which is condemned and declared to be criminal as tending to monopoly and is sought to be combated in various ways, specially because it resulted in unrighteous enhancement of prices.

Legislation in the fifteenth and sixteenth centuries.

During the fifteenth and sixteenth centuries stringent laws were passed against the engrossing of various articles of consumption, all of which would come more or less in the category of necessities. Thus in the reign of Edward VI engrossing was prohibited in respect of “corn, wine, fish, butter, cheese, candles, tallow, sheep, lambs, calves, swine, pigs, geese, capons, hens, pigeons and conies.” Then, again, the so-called Assizes were expressly intended for controlling the price of necessary articles of consumption. The Assize of Bread passed in the reign of Henry II provided that the weight of a farthing loaf of bread was to vary with the price of wheat, i.e., when the price of wheat was low the farthing loaf was to be large, and smaller when the price of wheat was high. This provision was intended to limit the baker to a fair profit and thus confer a benefit upon the consumer by protecting him from unreasonable rises of price. The Assizes of Ale and Wine served a similar purpose and sought to maintain prices on a fair and reasonable level. The Assize of Cloth was passed for controlling the length, breadth and quality of cloth. The people in general highly appreciated these measures and resented any infringement of the provisions of the Assizes. There can be no doubt that in the Middle Ages there was a strong popular feeling in England against all agreements or organizations which made for monopoly or had for its object the keeping up of prices. Indeed, the feeling ran so high that in 1299 or 1300 several chandlers of Norwich were fined for

Popular feeling against combinations making for monopoly.

having made a covenant amongst themselves that none should sell a pound of candles cheaper than another. A monopoly in any shape or form was regarded as contrary to the spirit and policy of the common law. The ninth statute of Edward III was only declaratory of the common law. In the fifth and sixth years of Edward VI we find an act against forestallers, ingrossers and regrators¹, which was also declaratory of the common law. Commenting on this statute Adam Smith in his 'Wealth of Nations' says, "Our ancestors seem to have imagined that the people would buy their corn cheaper of the farmer than of the corn-merchant who, they were afraid, would require over and above the price which he had paid to the former an exorbitant profit to himself. They endeavoured, therefore, to annihilate his trade altogether. They even endeavoured to hinder as much as possible any middleman of any kind from coming in between the grower and the consumer. The statute of Edward VI, therefore, by prohibiting as much as possible any middlemen from coming in between the grower and the consumer, endeavoured to annihilate a trade, of which the free exercise is not only the best palliative of the inconveniences of a dearth, but the best preventive of the calamity; after the trade of farmer, no trade contributing so much to the growing of corn as that of the corn merchant."²

Adam Smith's
comment on 5 and
6 Edward VI, C. 14.

From the above passage it is quite clear that the good citizens of those times did not perceive, as Adam Smith did later on, that the merchant while relieving the farmer of his products, did a service to the farmer and to the citizen as well, and that the merchant's profits were in general little more than the equivalent of wages for the service he rendered. It was the excesses of certain merchants which provoked the wrath of the citizens. Some merchants no doubt made excessive profits by raising of prices. Their unworthy conduct led to the sweeping generalization that all merchants were monopolists and given to oppressive methods calculated to keep up prices at a prohibitive level. The Acts of Parliament such as those passed

¹ 5 and 6 Edward VI, C. 14.

² 'The Wealth of Nations,' Book IV, Ch. 5.

12 George III. C. 71 repealed all existing statutes on the subject of forestalling, etc.

in the reign of Edward VI were intended to counteract the tactics of such merchants. The attempt was no doubt disinterested and well-meant, but it went against the natural course of trade and the laws of economics. It had, therefore, to be repealed in the reign of George III.¹ By this Act Parliament sought to repeal all existing statutes relating to the offences of regrating, forestalling and ingrossing. The preamble of the Act recites, "Whereas it has been found by experience that the restraints laid by several statutes upon dealing in corn, meal, flour, cattle and sundry other sorts of victuals, by preventing a free trade in the said commodities, have a tendency to discourage the growth, and to enhance the price of the same; which statutes, if put in execution, would bring great distress upon the inhabitants of many parts of this kingdom, and in particular upon those of the cities of London and Westminster, etc., etc." Notwithstanding, however, that the object and intent of the Act was to abrogate the common law offence by the repeal of the statute of Edward VI against monopolies, the courts, under the lead of Lord Kenyon, continued to hold that regrating, forestalling and engrossing were offences at common law.² The courts practically disregarded the repealing Act of George III inasmuch as they held that, despite that statute, regrating, forestalling and engrossing continued to be offences at common law. Hence Parliament, on the 4th of July, 1844, passed a general repealing Act, the preamble of which definitely declared the public policy of England. This Act abolished in whole or in part eighteen restrictive English statutes, some ten Scotch statutes and eight Irish. It provided that it should not apply to the offence of fraudulently spreading or conspiring to spread false rumours with intent to affect the prices of goods or merchandise, nor to the offence of wrongfully preventing, by force or threats, goods or merchandise being brought to market. The effect of the Act of 1844 was that regrating, forestalling and engrossing, if accompanied by fraud, remained offences under the law. It has to be noted in this connection that in an appeal

¹ 12 George III, C. 71.

² *The King v. Waddington* (1800). 1 East, 143.

from India decided by the Judicial Committee of the Privy Council in 1850 their Lordships pointed out that the common law offence of engrossing or regrating applied only with respect to the necessities of life, and that the principles underlying these offences ought not to be extended for they "would not meet with countenance in these times when the true principles of trade and commerce are better and more generally understood."¹ "There is no law," said their Lordships, "which prevents any person buying any quantity of a commodity at any price that he likes, whether to use himself or to sell again in gross or by retail or to give away or to prevent another having it, provided always that he does not commit the common law offence of forestalling and regrating, which this is not, or ingrossing, which the authorities show can only be committed with respect to the necessities of life; provided, also, he makes no false representation in order to effect the purchase."²

A parallel attempt was made by means of legis-
Legislation for
regulating wages
of labourers.
 lation to regulate the wages of labourers. This was found to be absolutely necessary especially after the Black Death of 1348, which decimated the population of England and thus caused a considerable scarcity of labourers. In the years 1349 and 1351 were passed the Ordinance and Statute of Labourers, which provided that labourers, carpenters, masons, plasterers shoe-makers and other craftsmen having no other means of livelihood were not to refuse to work for any one offering to pay wages at the rate that prevailed before the plague. The measure, however, went against the natural course of trade and labour. The employers were many but the labourers were few. Naturally, the latter would not accept low wages when there was such a considerable demand for their services. Thus this piece of legislation hardly produced any good or abiding result; all that it did was to cause much hardship and suffering to those who acted in contravention of its provisions.

¹ *Doolub Dass v. Ramlall Thackersey Dass*, 5 M.I.A., 109.

² *Ibid.*, page 152.

§ 3. HISTORY OF GILDS.

The ancient gilds—
general features.

Another prominent instance of monopolies of the olden type is to be found in the ancient gilds. The history of the gilds and the regulations that governed them clearly indicate that their object was to create monopoly. How far they succeeded in their object has to be considered. It appears at any rate that they succeeded in exercising a control over the prices of commodities and also over the quality of wares and the wages of servants. They succeeded also in restricting the number of persons who could enter a particular trade, thereby checking competition and preparing the way for monopoly profits. But while they looked after the interest of the producer in the main, they also conferred benefit on the consumer by securing to him a good article, and this they did by means of various stringent regulations touching the production of articles of consumption.

The merchant gild
—its character and
objects.

The merchant gild, or house, was “a Society formed primarily for the purpose of obtaining and maintaining the privilege of carrying on trade, a privilege which implied the possession of a monopoly of trade in each town by the gild brethren as against its other inhabitants and also liberty to trade in other towns. The exact character of the monopoly probably varied somewhat from place to place.”¹ The gild merchant also exercised jurisdiction over its members, drew up and enforced regulations for trade and punished breaches of commercial morality. It is said that the first positive mention of a merchant gild is certainly not earlier than 1093.² Before the conquest there had existed religious gilds and frith gilds, i.e. clubs or societies for the performance of certain pious offices and for mutual assistance in the preservation of peace. From the reign of Henry I onwards we find a long series of charters granted to towns by the king or other lords; and in all these charters the recogni-

¹ Ashley's 'Economic History,' Volume I, Chap. II. See also Pollock and Maitland's 'History of English Law,' Vol. I, p. 564.

² Ashley's 'Economic History,' Volume I, Chap. II, p. 71. "The gild merchant came into existence in England soon after the Norman conquest, as a result of the increasing importance of trade."—Palgrave's 'Dictionary of Political Economy,' Vol. II, p. 210.

tion of a merchant gild occupies a prominent place.¹ The conclusion arrived at from this is that the merchant gilds had been in existence before they were so recognised and the charters in question only gave sanction to the controlling power which the societies already enjoyed and the rights which they sought to secure for their members.²

The members of the merchant gild were not necessarily great merchants. Agriculture was still one of the main occupations in most of the towns, and a considerable portion of the trade consisted in the sale and purchase of the raw products of agriculture such as skin, wool, corn, etc.

The charters to towns granting permission to have a merchant gild usually contained a clause to the effect that none but members of that society were to engage in trade. In one case it is expressly stated that the members are to have the monopoly even in the retail sale of cloth. A remnant of the old merchant gilds—in fact the only merchant gild still surviving in England—is that of Preston, its charter having been granted by Henry II towards the end of the twelfth century. Among the “Liberties of Preston” may be mentioned the following—“That they shall have gild mercatory with Hanse and other customs and liberties belonging to such gild, so that no one who is not of that gild shall make any merchandise in the said town unless with the will of the burgesses.”

One of the chief objects of the gild was the maintenance of the society's privileges. Thus one often comes across ordinances against acting as agents for the sale of goods belonging to non-members, or aiding or assisting an outsider merchant to purchase to the detriment of members of the gild. A no less important feature of the gild's jurisdiction was the drawing up and the enforcing of wholesome regulations affecting matters of trade. These regulations indicate a

¹ Ashley's 'Economic History,' Vol. I, Chap. II.

² “Its chief function was to regulate the trade monopoly conveyed to the borough by the royal grant of *gilda mercatoria*. The gildsman had the right to trade freely in the town, and to impose payments and restrictions upon others who desired to exercise that privilege. The ordinances of the fraternity thus aim to protect the brethren from the commercial competition of strangers or non-gildsmen.”—Palgrave's 'Dictionary of Political Economy,' Vol. II, p. 210.

strong feeling underlying them all that the well-being of the trade or industry was the supreme object to be kept in view, that each was bound to submit to regulations for the common good, and to be of assistance to his fellow members. Thus maintenance of fair dealing and of a high standard of quality in the goods sold formed one of the main objects of the regulations.

The craft gild—
its character and
objects.

The rise of craft gilds is of later date.¹ The craft gilds might be regarded as mutual benefit societies or associations of artisans engaged in a particular industry in a particular town, formed with the object of securing and maintaining their common well-being. Here is a vivid description of the character of a craft gild and of its members, and it is specially interesting because, incidentally, it describes the system of apprenticeship prevalent in those times, in respect of all branches of trade. "As a rule no man could become a shoemaker unless he entered the gild through the doorway of apprenticeship. When he had completed seven years, more or less, of bondage under a master shoemaker, the apprentice became a journeyman and was permitted to work for other masters. When he found himself able to acquire a shop of his own and to establish himself in business he became a master shoemaker and a full member of the gild. He paid his fees at stated times and incurred fines when he transgressed the rules. He made boots and shoes according to the standards set by the officers of the gild. He sold them at prices fixed by the same authorities. He employed as many journeymen and apprentices as the gild allowed. He paid his men according to the appointed scale of wages. He attended the meetings of the gild and enjoyed the society and conviviality of his brethren. At the annual meeting he voted for the election of gild officers, whether they were called wardens, aldermen, searchers, overseers, bailiffs or masters. On the first day of the gild's patron saint

¹ It was in the second half of the eleventh century that merchant gilds began to come into existence; during the twelfth century they arose in all considerable English towns. The rise of craft gilds is, roughly speaking, a century later; isolated examples occur early in the twelfth century,—they become more numerous as the century advances, and in the thirteenth century they appear in all branches of manufacture and in every industrial centre—Ashley's 'Economy History,' Volume I, Chapter II, p. 76. For an early history of the gilds see also Palgrave's 'Dictionary of Political Economy,' Vol. II, p. 208.

he went in procession to the church. In time of war he marched in the train-bands beside the brethren of his craft. In poverty he received aid from the common fund. In sickness his brethren visited him. Dying in poverty he was buried with shoemakers' rites at the expense of the gild, while the same benevolent association had masses said for the repose of his soul, and provided for the support of his widow and orphan children. His children after him were shoemakers unto the third and fourth generation."¹

Up to the reign of Edward I the craft gilds grew up spontaneously, their object being to secure mutual help and advantage to the craftsmen. For their recognition they were obliged to make annual payments to the king or other lords, as the case might be. Yet their position was not secure and they found it hard to maintain their rights against the municipal authorities. It was Edward I who first perceived the latent power of these bodies. He resolved to utilise them as an effective counterpoise to the power of the governing bodies in the towns. He accordingly initiated a new policy whereby the gild system was not only to be tolerated as before, but encouraged and extended. This was done in various ways such as by securing due supervision of the crafts, and by providing for due punishment of those who offended against their regulations through the machinery of the crafts themselves. The regulations had for their object the prevention of fraud and the maintenance of certain standards of size and quality in the wares produced.²

How craft gilds
arose and grew in
power and number.

¹ Le Rosignol's 'Monopolies Past and Present,' pp. 45-46.

² The regulations in fact covered many details of conduct on the part of the workmen, as will appear from the following:—

"Penalties were provided, as far as possible, for every sort of deceitful device: such as putting better wares at the top of a bale than below, moistening groceries so as to make them heavier, selling second-hand furs for new, soldering together broken swords, selling sheep leather for doe leather, and many other like tricks. It was for the same reason that night work was forbidden; not, as Brentano says, with the philanthropic object of providing work for all, but because work could not be done so neatly at night, and because craftsmen, knowing they were not likely to be visited at that time by the wardens, took the opportunity to make wares "falsely" or because working at night disturbed the neighbours. It seems, however, to have been a general rule that men should not work after six o'clock on Saturday evening, or on the eves of Double Feasts."—Ashley's 'Economic History,' Vol. I, Chapter II, pp. 90-91. Besides making rules such as those above mentioned the gilds had also very wholesome rules tending to promote mutual assistance in difficulties and co-operation for meetings, festivities and common worship.

Articles produced in contravention of these regulations or failing to come up to the exact requirements laid down therein were called "false" just in the same way as we would call counterfeit coin "false" money. The workmen responsible for such production were punished by fines, one half of the fines going to the craft and the other half to the town funds. If the offence was repeated, on the third or fourth occasion the drastic punishment of expulsion from the trade was meted out to the offender. The craft guilds gradually grew in number till, at the end of the reign of Edward III, there were in London as many as forty-eight companies or crafts, each self-contained and with separate officers of its own; and soon afterwards their number rose to sixty. The craft guilds were known by various names. Thus we read of the Company of Weavers, the Gild of Tailors, the Craft of Glovers, the Fraternity of Carpenters, the Mysterie of Barbruers, the Fellowship of Cordwainers and Shoemakers, the Society of Shipwrights, the Brotherhood of Barber-Surgeons and the like; and the regulations which governed them respectively were as various as their names.¹

Importance of the
guilds in the
Middle Ages.

It cannot be doubted that the guilds were a most important factor in the development of economic life in the Middle Ages. This was so particularly in England where the kings gave them protection in various ways and secured them against feudal encroachments. We have observed above how the important towns obtained charters of liberties from the kings. In a similar manner the guilds gradually obtained powers of municipal government from the kings. It was the merchant guilds that first obtained control of the town government. The craft guilds followed.² As, however, time went on, the guilds found it more and more difficult to maintain their privileges or to carry their ordinances into effect. The monopoly of the guilds to civic power became objectionable. Their rules and ordinances gradually became odious and unenforceable.

¹ See Le Rosignol's 'Monopolies Past and Present,' p. 46.

² The origin of the latter is not to be attributed to the former. "There was seemingly no organic connection between the two classes of guilds, though many artisans probably belonged both to their own craft fraternity and to the gild merchant, and the latter owing to great power in the town, seems to have exercised some sort of supervision over the craftsmen and their societies"—Palgrave's 'Dictionary of Political Economy,' Vol. II, p. 211.

Their exclusiveness, in particular, made them intolerable. Outsiders saw no reasonableness or justification in their being shut out. The weavers' monopoly in London seems to have become a grievance as early as the year 1321. Later, we read of the guilds as setting the local authorities at defiance and working harm to the people. An Act had to be passed in redress of these grievances. The preamble of the Act recites that "masters, wardens and people of guilds, fraternities, and other companies corporate, dwelling in diverse parts of the realm, oftentimes by colour of rule and governance and other terms in general words to them granted and confirmed by charters and letters patent of diverse kings made amongst themselves many unlawful and unreasonable ordinances as well in prices of ware and other things for their own singular profit, and to the common hurt and damage of the people, etc." The Act provided that the ordinances of the guild should have to be submitted to justices of the peace and recorded by them. Ultimately, the economic importance of the guilds disappeared. There appeared a new and an all-powerful factor in the realm of economics in the shape of competition, and every traditional restraint or mode of governance, whether it was by guilds or other long-recognised institutions, turned out ineffective. Free and open competition began to determine the prices. But the control of town government yet remained in the hands of the guilds. It was not till the nineteenth century that this final monopoly passed away.

While the control and regulation of internal trade was in the hands of the merchant guilds, the Foreign trade was in the hands of the merchants of the Staple. The institution of the staple arose about the middle of the thirteenth century. The settled policy of the Kings of England in those days was to prevent the free and unrestricted export of English goods. Thus arose what were called staple towns, and it was expressly ordered that English goods such as wool and leather could be sold to foreign merchants only at a staple town. Thus we hear of Calais, Bruges, Antwerp as staple towns. Later on, we find certain English towns designated staple towns, and foreign merchants were invited to come to England and buy

The foreign trade was in the hands of the merchants of the staple

goods there for foreign export. Thus the staple towns enjoyed a monopoly of English export trade, and the merchants of the staple obtained special privileges not accessible to other merchants. Gradually, they acquired the right of nominating the Mayor of the town, and the Mayor and Aldermen of the Staple had the entire control and regulation of trade in the staple town. It was not till the eighteenth century that the staple began to decay and gradually gave place to a new order of things.

The Hanseatic
League.

It would hardly be appropriate to close this part of the subject without a passing reference to the Hanseatic League which grew up into a powerful monopoly at one time comprising as many as eighty-five German cities and carrying on a rich and profitable trade with England, Scandinavia, Russia and other countries. It is said that the League was originally formed for the purpose of providing protection against piracy. "It is clear," says Mr. Thorold Rogers,¹ "that the association was formed in order to put down the Norse freebooters, whom a foolish habit of seeing courage and spirit in piracy and brigandage has white-washed. In this object they succeeded; they became a power, had a treasury, and the fatal gift of property which could be plundered." But the pirates were not the only danger to be combated by means of co-operation, and it cannot be doubted that the German Hansards combined together for purposes of general mutual protection and for the purpose of securing monopoly privileges in England and other countries. The Hanse towns and the League were the object of many charters. Later on, there was a large immigration of merchants into the city of London and representatives of the Hanse towns were gladly accorded a settlement in London under the name of the Aldermen and Merchants of the Steelyard. Thus German merchants wishing to trade with England were obliged to join the Hanse. The League was in close touch with the merchant guilds which controlled the Government of the various towns. In the thirteenth century the League became a most powerful

¹ 'The Industrial and Commercial History of England' by Mr. Thorold Rogers, p. 300.

body. In fact it grew up into a great offensive and defensive alliance. For purposes of protecting the interest of the League they sometimes carried on war and they even interfered in England during the Wars of the Roses. In the sixteenth century we find the League declining, and then came the 'Thirty Years' War which finished it.

In India the existence in ancient times of permanent associations of the type of merchant guilds is very doubtful. There are numerous instances of corporate activity amongst merchants mentioned in the *Jataka* stories. But it is not clear if those are examples of the activity of institutions of a permanent nature. Moreover, there is hardly any reliable evidence available from which the nature and character of these organisations, if any, could be gathered. It is probably on these grounds that Mrs. Rhys Davids comes to the conclusion that "there does not seem to be much warrant for concluding that there was any extensive system of organisation in the shape of merchant guilds in ancient India."¹ Dr. Richard Fick, another authority on the economic conditions in ancient India, denies the existence of any close organisation amongst the merchants and traders in Buddhist times.² In modern times, however, we find numerous instances of permanent organisations of merchants, specially in the Bombay and Madras Presidencies. Such institutions are usually called Mahajans and occupy a slightly higher status than the sister associations of craftsmen which go by the name of *Punchayet*.³

Merchant guilds in Ancient India.

Merchant guilds in modern India.

The guilds of workmen approximating to the craft guilds of mediaeval Europe are found to be in a developed state in India from very ancient times. It is possible that these craft guilds existed as far back as the

Craft guilds in Ancient India.

¹ (1901) Article in the *Economic Journal*, p. 313.

² Dr. Richard Fick's 'Soziale Gliederung in Nordostlichen Indien Zu Budha's Zeit.' Dr. R. C. Mozumdar, however, on more or less the same materials, comes to a different conclusion and is of opinion that in ancient India there was some sort of a permanent organisation amongst merchants and traders resembling those of the merchant guilds of mediaeval Europe. (See Dr. Mozumdar's treatise 'Corporate Life in Ancient India,' p. 32, sec. 12). But in the absence of any new evidence of a convincing nature, it is difficult to agree with Dr. Mozumdar's views in opposition to the opinions of such well-known authorities as Prof. Rhys Davids and Dr. Richard Fick.

³ *Bombay Gazetteer*, Vol. IV, p. 106, and Vol. VII, p. 161; Prof. J. C. Sinha's article on 'Indian Guilds' in the *Bengal Economic Journal*, Vol. II, pp. 309-10.

Brahmanas as we get the word *Shresthin* there and according to Prof. Macdonell the word may already have acquired the sense of 'the headman of a gild,' the modern 'Seth.' There can be no doubt that the craft gilds were in full working order about the time of the earliest *Dharma Sutras*. Thus we find in the *Gautama Dharma Sutras* that the additional occupations of a Vaisya are "agriculture, trade, tending cattle and lending money at interest."¹ This list may be taken to include at least all the important occupations of the people at large that were within the knowledge of the writer, and so it becomes significant when he says in the very next chapter that "cultivators, traders, herdsmen, money-lenders and artisans (have authority to lay down rules) for their respective classes" and "having learned the (state of) affairs from those who in each class have authority (to speak) the King shall give the legal decision."² This would mean that practically all the different branches of occupations mentioned above had some sort of definite organisation, and the organisation must have been sufficiently advanced, as its rules were recognised as valid by the law, and its representatives had a right to be consulted by the King in any matter. Mrs. Rhys Davids after having carefully collected and analysed a great deal of data from Buddhist sources comes to the following conclusions³:—"In all probability there was scarcely a single trade or calling, but was organised as a gild (*Seni*) with its own special rules and its acknowledged head. Master mariners, literally, navigators had also a recognised chief, so too had the profession of caravan constabulary. * * * * The 'gilds' are frequently mentioned as a leading factor in the body politic summoned by and attending upon the King, either *en masse*, or through their heads or representatives, who were apparently permanent court officials and even 'great ministers.' One of the *Jataka* stories records the inception of further organisation in the appointment of a permanent president over all the gilds vested in the person of the 'Lord of the Treasury.'⁴

Rhys Davids.

The *Jatakas*.

¹ 'Sacred Books of the East,' Vol. II, p. 237; *Gautama* XI, 21.

² *Gautama S.B.E.*, Vol. II, p. 237.

³ Rhys Davids' article on 'Economic Conditions in Ancient India' in the *Economic Journal* (1901), p. 313.

⁴ *Jataka* IV, No. 445.

The leading gilds are spoken of as eighteen ¹ in number, 'to wit, the carpenters, smiths, leather workers, painters and the rest.' Of their special regulations we have as yet no evidence to show. Apprentices are often mentioned but not the rules of apprenticeship. But that the gild as a body exercised a quasi-paternal control over its members is evinced by the ordinance of the Buddhist church, which forbade the giving of religious orders to the wife of a member unless his gild sanctioned it. This tendency of the Indian to mutual organisation—in which he resembled his later kinsmen the western Aryans of the Middle Ages—found further expression in the general institution still in force, of a headman or syndic in every village. And when the village consisted of the craftsmen of one localised industry the functions of syndic and president of the local gild would be doubled in the same person. Such a functionary might attain a high social status, for instance, the 'elder' of a village of 1000 smiths is described as 'a favourite of the king (of Benares), rich and of great substance.' ² Thus we find that about the time of the *Dharma Sutras* and the *Jatakas* the gilds had already a president or alderman and a set of officers who used to discharge the executive functions. We also find that they had a Court official, the Treasurer, who was appointed by the King, and one of whose principal duties was to act as a judge in all disputes between the different gilds. We also come across apprentices but not yet with the rules of apprenticeship. In Kautilya, who is now recognised to be an authority more or less contemporaneous with the *Dharma Sutras*, and in Narada and Brihaspati who are authorities of a somewhat later date (about 400–500 A.D.), we come across more detailed information about the organisation and importance of the gilds.

In Kautilya's *Arthashastra* (about 300 B.C.) we find that the leaders of the gilds had already obtained such wide powers that by their misuse they were injuring the life and property of others. ³ The gilds were

¹ This number must be taken as a conventional one. Dr. Mozumdar in his 'Corporate Life in Ancient India,' p. 4, gives a list of about twenty-eight such gilds. ² *Jataka* III, No. 387.

³ Kautilya's 'Arthashastra,' edited by R. Shamasastri, p. 403 (referred to in Mozumdar's 'Corporate Life in Ancient India,' p. 7).

considered to be such important institutions that the Superintendent of Accounts had to enter their 'customs, professions and transactions' in a prescribed register¹ and three ministers enjoying the confidence of the guilds were appointed to protect artisans and officers and to receive their deposits which could be taken back in times of distress.² Special concessions were made with regard to law suits between guilds, and special privileges were accorded to a merchant belonging to a trade guild.³ Even places were reserved in the fort for the residence of the guilds and the corporations of workmen⁴ and the taxes paid by the guilds are included in the most important sources of revenue.⁵ Kautilya also mentions a few of the privileges which these guilds of workmen enjoy and gives us some of the rules under which they work.⁶ Thus the guilds get a grace of seven nights over and above the period agreed upon for fulfilling their engagements, and the guilds of workmen divide their earnings either equally or as agreed upon among themselves. "A healthy person who deserts his company after work has been begun shall be fined 12 panas, for none shall of his own accord leave his company. Any person who is found to have neglected his work shall be shown mercy for the first time and given a proportional quantity of work anew with promise of proportional earnings as well. In case of negligence for a second time, or of going elsewhere, he shall be thrown out of the company. If he is guilty of a glaring offence he shall be treated as the condemned."⁷ Narada (about 500 A.D.) clearly lays down that the King must maintain the usages of the guild and other corporations. "Whatever be their laws, their religious duties, the rules regarding their attendance and the particular mode of livelihood prescribed for them, that the King must approve of."⁸ We are also told that those who sow dissension among the members of an association should be severely punished as they would prove dangerous as an epidemic if they are allowed to go free.⁹ Narada also gives

Narada

¹ Kautilya, p. 69, l. 33.

² *Ibid.*, p. 228, l. 28

³ *Ibid.*, p. 66, l. 4.

⁴ *Ibid.*, p. 236, l. 6

⁵ S.B.E. Vol. XXXIII, Narada X, 3, p. 154

⁶ *Ibid.*, Narada X, 6, p. 155.

² *Ibid.*, p. 253

⁴ *Ibid.*, p. 61, l. 31

⁶ Kautilya, p. 235, l. 16

us the rules of apprenticeship.¹ Thus we find that the master made an agreement with his apprentice as to the period of apprenticeship and the latter had to live in his master's house till the expiration of the period. If the apprentice forsook his master he might be compelled by forcible means to remain with his master and would deserve corporal punishment. But the master was to teach him, feed him and treat him like a son. While the apprentice thus got his board and lodging at his master's expense, the profits arising from the work done by the apprentice went to the master, and the apprentice could not leave his master before completing the full period of apprenticeship although his course of instruction might have been completed before the expiry of this period. But if the master permitted him to do so the apprentice, after having learnt his art, could leave his master within the stipulated period and return home, but he must reward his master as plentifully as he could. In Brihaspati (about 600 A.D.)² we find that the executive authority which enabled the gild to perform its various functions was a chief or president, assisted by two, three, or five executive officers. Only persons who were "honest, acquainted with the *Vedas* and with duty, able, self-controlled, sprung from noble families and skilled in every business" were to be appointed as officers. These officers exercised a considerable amount of authority over individual members. Thus if an individual failed to perform his duty, though able to do the same, he could be punished by the confiscation of his entire property and by banishment from the town. Whatever was done by these officers whether harsh or kind towards individual members, in accordance with prescribed rules, must be upheld by the King. But if the officers were actuated by hatred or malice and injured a member then the King could interfere. Thus it is clear that an appeal lay to the King from every decision of the executive officers, but the King could only grant relief if the decision of the officers was actuated by personal feelings and was not in accordance with prescribed rules.

¹ *Ibid*, Narada V, 16-20, pp 133-4

² S.B.E Vol XXXIII, Brihaspati, Chapter XVII, 9-20, pp 347-9

The monopoly of
caste in India.

Effect of caste on
industries and
callings.

Manu.

A dissertation on the ancient monopolies in India will not be complete without a reference to what might be called the monopoly of caste. The characteristics of the caste system, however, as well as its history and work in India, differ very much from those of the craft-gilds of Europe. The caste system as such is no integral part of the constitution of municipal or town government, nor has it anything to do with charters or grants from the King. It is a vast social fabric built on a religious or quasi-religious foundation.¹ It has had, however, a very far-reaching effect upon the development of industries and on the transmission of talent or acquired skill from generation to generation. Of the four primary castes, the Vaisyas or the third caste form the back-bone of the commercial class. The Kshatriyas or nobles whose proper calling is to bear arms may also engage in trade. But the Brahmana is not entitled to do so unless it be a case of necessity or exigency. The Sudras who form the servitor or lowest caste supply the bulk of the mechanics, artisans, and labourers such as weavers, tanners, carpenters, black-smiths, gold-smiths, fishermen and the like. Thus in ancient India one's calling, generally speaking, had not to be determined by one's own choice, or the pleasure or patronage of a society, or a period of apprenticeship in some firm or factory, but it was in fact in most cases predetermined for him by the caste in which he was born and to which he necessarily belonged. Not every person could engage in trade in ancient India. Commerce or trade proper was restricted to Vaisyas. They alone had the control of the buying and selling of commodities. A Brahmana could not engage in trade except when he was in distress. Thus Manu lays down that a Brahmana might in distress live by the occupation of a

¹ Legends invest it with somewhat of a religious significance. But it appears, originally, to have been based on the distinction of different callings or professions. Thus the *Vāyu Purāna* describes how in the first or *Kṛita* age there existed no castes, but, subsequently, *Brahmā* established divisions among men according to their persuasions. "Those of them who were suited for command and prone to deeds of violence, he appointed to be *Kshatriyas*. Those disinterested men who attended upon them, spoke the truth and declared the Veda aright were *Brahmanas*. Those of them who were feeble, engaged in the work of husbandmen, tillers of earth and industrious, were *Vaisyas*. Those who were cleansers and ran about on service and had little vigour or strength were called *Sudras*." See also *Mahabharata*, *Santi Parva*, Sec. 138

Kshatriya, or even that of a Vaisya.¹ The Mitakshara The Mitakshara. commenting on this subject observes : "A twice-born person, that is, a Brahmana, when by reason of being depended upon by a large family, is unable to subsist by the occupation of his own caste, might live by the occupation belonging to a Kshatriya, that is by such things as bearing arms and so on, at the time of distress. When he is not able to live even by that he might live by the occupation belonging to a Vaisya, such as trade, etc., but not by the profession of a Sudra." Again, when a Brahmana was thus compelled to give up the pursuit of his own legitimate calling, he was not free to go the whole length and be an out-and-out Vaisya. Though by occupation a Vaisya, there were restrictions on what he could sell. Fruits, stones, linen, soma, men (slaves), wheat, cake, herbs, sessamum, boiled rice, a Brahmana shall not sell at any time.² Similarly, the Sudra had a place allotted to him in the social and economic life of the people. His work was to serve the twice-born classes. But when unable to make a living in the sphere of life assigned to him he might become a merchant or live by various handicrafts, contributing to the comfort and convenience of the twice-born classes.

Regarding the social usages prevailing in Northern India between the sixth or seventh century B.C. and the date of the Emperor Asoka, Mrs. Rhys Davids Mrs. Rhys Davids on the caste in Northern India has made an important collection of data from early records upon which she comes to the conclusion that the ancient records go far to show that "there was no such thing as a hard and fast division of the industrial world into hereditary groups and castes, but, on the contrary, there was a considerable degree of mobility both of labour and capital." At the same time there was considerable specialisation and localisation of industry. We are told that there were villages of carpenters, of iron-smiths, etc., as also villages of Brahmanas. Brahmanas appear frequently in the *Jataka* stories as cultivating their own acres aided sometimes by their families and slaves or hired labourers. And in at least one case such a person, owning a thousand

¹ Manu, Chapter X, verses 81 and 82.

² See Manu, Chap. X, verses 86-89; S.B.E. Vol. 25, p. 421.

Karisas, is described as living in a Brahmin village.¹ There were, however, Brahmanas and Brahmanas. Those who took their hereditary sacerdotal functions seriously undertook no wordly calling, abstaining from agriculture as much as from hunting, trade, or usury. The law-books expressly declare agriculture to be unfit for either Kshatriyas or Brahmanas. The latter might engage in them only in distressful circumstances or if they took no active part in the work.²

Competition well
nigh rules the day
now

All this is now ancient history. One's calling is at present determined in India by the sovereign needs of competition. True the weavers, carpenters, goldsmiths, blacksmiths, milkmen and craftsmen of various sorts exist at the present day as separate castes—mostly confined within the Sudra class. But under the levelling influence of western civilization the castes and sub-castes, from an economic point of view, are fast losing their restrictive barriers.

¹ Economic Journal (1901), article headed "Economic Conditions in Ancient India," pp. 310-12; *Jataka*, Vol. IV, No. 484.

² 'Sacred Books of the East,' II, 123, 225, 229, XIV, II, 175, 176; XXV 272, 325.

LECTURE IV.

MONOPOLY OF TRADING COMPANIES.

The history of the Hanseatic League is closely associated by way of rivalry with that of the Company of Merchant Adventurers, which marks the border-line between the guilds of the Middle Ages and the trading companies forming the subject of the present lecture. The Company was established in London but had branches at Exeter and Newcastle. It received its first charter of privileges in the year 1407 as the Brotherhood of St. Thomas a Becket. In the year 1505 King Henry VII granted a fresh charter under the name of the Fellowship of the Merchant Adventurers of England. Soon, it grew into a most powerful and influential body and came to have about four thousand members. This is how the Company is described as it was in the year 1601. "The Company consists of a great number of wealthy merchants of diverse great cities and maritime towns in England, London, York, Norwich, Exeter, Ipswich, Newcastle, Hull, etc. These of old times linked themselves together for the exercise of merchandise by trading in cloth, kersies, etc., whereby they brought great wealth to their respective places of residence. Their limits are the towns and ports lying between the river Somme and all the coasts of Netherland and Germany within the German Sea; not unto all at each man's pleasure, but unto one or two towns at most within the same bounds, which they commonly call Mart Towns, or Towns, because there only they stacked their commodities and put them to sale and thence only they brought such foreign wares as England wanted, and which were brought from far, by diverse nations flocking thither to buy and sell as at a fair."

The Company of
the Merchant
Adventurers

The various companies of merchant adventurers which were authorized at the time had definite territorial limits assigned to each of them, within which its members were privileged to trade. There were advantages of such a system and although there was a large and persistent opposition to companies by advocates of open trade the companies succeeded in

obtaining a firm footing. The advantages are obvious. First, from the point of view of the State. It was scarcely possible for the kings to exercise control over the minutiae of foreign trade. There were few consuls at foreign ports; and even where there were consuls they would not have had authority over buyers and sellers. It was, therefore, found expedient for maintaining a hold on foreign commerce and regulating it on proper lines to take recourse to the Merchant Adventurers. The State proceeded to confer special trading privileges on these bodies of merchants and make them responsible for the proper conduct of traffic on lines most advantageous to the realm, as well as profitable to themselves. Secondly, from the point of view of the members themselves. The companies offered benefits which were highly appreciated. Among other benefits, Cunningham points out, "It was possible for such a body to secure definite privileges, as to tolls and customs for their foods and a satisfactory status in regard to the recovery of debts and other civil business."¹ But apart from all this, the companies of merchant adventurers like the merchant and craft gilds succeeded in framing useful and effective rules for securing fairplay among the merchants. "No one," for instance, "might trade at odd times or in secret places, but fairly and openly. A minimum price was fixed and no one was to spoil the market by taking less; but if he failed to get the price, other merchants could be required to take the foods off his hands; only when the market was regularly glutted, and after consultation with others, was a merchant permitted to lower his price; no one man was allowed to undersell others. Similarly, the "stint" was intended to prevent any one dealer from engrossing the whole trade; the merchant adventurers had elaborate arrangements for apportioning this limited amount of business among the different members of the company, so that each might have a fair chance of earning his living by his calling."² Lastly, there were considerable profits which

¹ Cunningham's 'Growth of English Industry and Commerce, Modern Times,' Part I (1903 edition), p. 219.

² 'Ibid', p. 220.

naturally drew to its support and co-operation a large body of powerful and influential merchants. That the profits were phenomenal is evidenced by the fact that outsiders or "interlopers" often thought it worth their while to poach upon the trade of adventurers, notwithstanding the risks which they inevitably ran by doing so. Cases of such interlopers were of frequent occurrence.¹ The charge persistently levelled against the companies by outsiders was that they were odious monopolies. It was as often met by the companies by the assertion that the merchants were quite free to compete with one another within the prescribed limits, and hence there could be no monopoly. Besides, they were subject to competition with the Hanseatic League and other alien merchants. They claimed, on the contrary, that they conferred a benefit on merchants by ensuring a steady trade with no violent fluctuations and that their rules and regulations tended to contribute to the common weal.

The struggle for supremacy between the merchant adventurers and the Hanseatic League was long and arduous. But it finally terminated in favour of the Merchant Adventurers in the sixteenth century and the Hanse Merchants were obliged to withdraw from the Steelyard in London. It is not possible within the scope of these lectures to discuss the later history of the adventurers and I, therefore, pass on to consider in brief one or two other companies of the time.

¹ *Vide* Cunningham's 'Growth of English Industry and Commerce' Vol. I. 'Modern Times,' Part I, p. 244: The west of England appears to have been a stronghold of interlopers; the clothiers there had objected, as early as the time of Henry VII, to the practical necessity which compelled them to send their drapery to Blackwall Hall in London, so that it might be shipped from there by the Merchant Adventurers who had the exclusive rights of exporting it to the Low Countries. Complaints were made by some Exeter merchants in 1660; but the answer of the London Company seems to have impressed the Government favourably, and the interlopers got no satisfaction. The traders of Bristol took the lead in a similar agitation in 1669, and endeavoured without success to get the merchants of Newcastle to join in other efforts; but the Tyneside men were in favour of well-ordered trade, and had little sympathy with interlopers though they had grievances of their own, of which some record has been preserved in the papers of the Newcastle branch of the Merchant Adventurers: "Although the merchant adventurers have dealt very unkindly to us yet in this case we do hold it more conducing to the common good of trade and the maintayning of our generall privilege to joyne with the the merchants of London rather than with these interlopers and if you find them (the London Branch) desirous of it (petitioning) if York and Hull will doe the like, wee shall joyne our force against those enemies of our trade."—*Newcastle Merchant Adventurers* [Surtees Society], II, 137.

It will have appeared from the above treatment that these companies were not 'Companies' in the modern sense of the term. A joint-stock company, by which is meant a corporation with one capital which the members hold jointly, is of later growth. In a joint-stock company the members are precluded from trading separately. In fact, they merge their individuality in the whole, their individual contributions go to make up the whole capital, and the profits too are not separate but make up one entire fund, which is subsequently distributed amongst the members. If special trading privileges are conferred on such a company, such as the sole right to deal in a particular class of goods, or in a particular tract of country, the company necessarily becomes a monopoly; and no one but the joint-stock company in question can deal in such goods or within such area. The character of the companies we have been hitherto discussing was evidently quite different. They have been designated 'regulated' companies. Each member of a regulated company might trade separately on his own capital. Only, he was bound to observe certain rules laid down for the general body. In other words, it was a federation of businesses. Strictly speaking, therefore, it was not a monopoly. But, in fact, it often proved to be a monopoly, by bringing an important trade or industry into the hands of a favoured few¹ who alone by reason of the charter, grant or special privilege, could control it and profit by it.

Regulation of
trade by the trad-
ing companies

There were various exclusive trading companies of the time in whose hands were entrusted the commercial development of the people. The closing of the Steelyard and the withdrawal of the Hanse privileges in London left the Merchant Adventurers the masters of the situation so far as the trade in the Elbe and the Rhine valleys were concerned. But there were yet large tracts of country which were covered by the activities of the Hanse League, and which were outside the scope of the charter granted to the adventurers.

¹ Cunningham's 'Growth of English Industry and Commerce, Modern Times,' Part I, p. 216. One of the means by which the benefits of the company were kept within narrow limits was the heavy, at times almost prohibitive, fine on admission to the society, and the efforts of the interlopers or independent traders were directed to reducing the amount of the fine, and thereby making it more accessible to all.

A new company called the Eastland Company was created by Elizabeth in the year 1579 having for its object the regulation and control of the trade with Scandinavia, Poland and the German ports on the Baltic. This Company like that of the Merchant Adventurers exported cloth, but presently it began to import from the shores of the Baltic, tar, hemp, cordage and all sorts of naval stores, and in the seventeenth century it seems to have carried on a most vigorous and prosperous trade. It appears to have been conducted on the footing of a regulated company, and, from all accounts, to have been carried on, on a fair and equitable basis, without being open to the charge of being an odious monopoly. Various causes, however, soon brought about its decline. The current of public opinion in England against the chartered companies was steadily gaining strength. Thus in 1672 "it was decreed, firstly, that there should be a free trade to Norway, Denmark and Sweden; secondly, that any one should be entitled to trade to the other Baltic ports within the limits of the Eastland Company's charter on his joining that company which, it provided, any trade could do on payment of 40s."¹ The Eastland Company ultimately had to give way before the Dutch maritime power which captured the trade in and about the Baltic.

The career and character of the Muscovy Company was somewhat different, inasmuch as it enjoyed throughout the reputation of being an odious monopoly. It was organized after the remarkable expedition of Sir Hugh Willoughby in the hope of finding a North-East passage to India. In the year 1555 the company obtained a charter whereby exclusive privileges were reserved in its favour for trade with Russia by the northern route. It also succeeded in obtaining special privileges from the Czar of Russia. In the year 1604 the management of the Company became the subject of severe strictures in the House of Commons: "The Muscovy Company, consisting of eight score persons or thereabouts, have fifteen directors, who manage the whole trade; these limit to every man the proportion of stock, which he shall trade for, make one

The Eastland Company.

The Muscovy or Russian Company

¹ Palgrave's 'Dictionary of Political Economy,' Vol. I, p. 673.

purse or stock of all, and consign it into the hands of one agent at Moscow and as again at their return, to one agent in London, who sell all, and give such account as they please. This is a strong and shameful monopoly, a monopoly in a monopoly, both abroad and at home; a whole company, by this means, is become as one man, who alone hath the utterance of all the commodities of so great a country " ¹

The company was originally started as a joint-stock company. Later, it became a regulated company. But the admission fine was put at such a high figure as successfully to exclude all but a few merchants. Thus though not a monopoly in form, it became in fact a very exclusive monopoly, and brought upon itself the criticism and condemnation of all right-minded persons. Owing to numerous representations on behalf of individual merchants a statute was passed (10 Will. III C. 6) by which the entrance fee payable to the company was definitely fixed at £5, and under these conditions the company existed until the close of the 18th century. The history of this company is of special interest inasmuch as it exemplifies the gradual victory of the interlopers in breaking down the monopoly of an exclusive corporation.

The Turkey
Company.

The Levant Company, otherwise known as the Turkey Company, was started later. During the 16th century various attempts had been made by Englishmen to obtain a share in the commerce of the Eastern Mediterranean. It was not till 1606 when the Turkey Company was freshly constituted that regular commerce was established between England and the dominions of the Sultan. It is interesting to note that by the charter granted by James I in 1605 to this Company, it had power "to fine and imprison members and subordinates who disobeyed its orders. No one might send ships to the parts designated by their charter, but such as were free brothers of the corporation, or otherwise licensed by them, who were to pay £20 for admission.... The Company, however, had never been an exclusive or oppressive monopoly, but on the contrary was based on the assertion of the inestimable liberty of trade. Every

¹ 'Commons Journals' I. 220, quoted in Cunningham's 'History.'

merchant who could pay the required entrance fee was of right admitted as a member, and was entitled to trade on his own account".¹ Its principal factories were at Smyrna and Aleppo, the latter being the depot for trade with Persia. Later on, the Turkey Company came into conflict with the French merchants and it met with its greatest adversary in the English East India Company. It had none of the faults of the latter and was not open to criticism as much as the latter undoubtedly was. But regulated companies were just becoming a thing of the past. The growing tendency was in favour of joint-stock companies. The Turkey Company gave way before this new change which had come over the State and the people in regard to their attitude towards business and commercial enterprises.

The joint-stock principle was applied with no very marked success to the trade with Africa. There were repeated schemes for establishing an African Company. In the year 1618 James I granted the first patent for a joint-stock company to organize a trade to Guinea. From this time onwards repeated attempts were made with little or no success of a permanent nature. In the year 1672 the Royal African Company also called the Guinea Company was founded by Royal Charter. At first it seemed to go well with the Company, and it secured the sympathy and goodwill of the public. But there was one great drawback. The royal charter, without a parliamentary status, failed to render the Company immune from attacks by 'interlopers' who began to outbid and undersell the Company. In 1698 the help of the Parliament was invoked and an Act was passed which definitely declared the trade open to all, but provided that every independent trader must pay a duty of 10 per cent to the Company to enable the Company to maintain the necessary fortifications and establishments. The duty, however, which was levied from the interlopers did not suffice for the Company's expenses on the upkeep of the fortifications. From 1730 onwards the Parliament granted the Company £10,000 annually towards its expenses. Even this did not suffice. In

The Early
African Companies.

¹ Palgrave's 'Dictionary of Political Economy,' Vol. III, p. 595.

1750 the Parliament had to interfere again—this time for winding up the joint-stock African Company and incorporating all traders to Africa as a regulated company with a fine on admission fixed at 40 shillings. But the affairs of the Company never looked up again. After some years of unprofitable expenditure the Company was finally wound up in the year 1821.¹

The Hudson's
Bay Company.

Another celebrated company of the period organized on a joint-stock basis was the Hudson's Bay Company² founded in the year 1670 by royal charter granted to Prince Rupert and seventeen other noblemen and gentlemen. The charter secured to the Company "the sole trade and commerce of all those seas, straits, bays, rivers, lakes, creeks and sounds in whatever latitude they shall be, that lie within the entrance of the Straits commonly called Hudson's Straits, together with all the lands and territory upon the countries, coasts and confines of the seas, bays, etc., aforesaid, that are not actually possessed or granted to any of our subjects or possessed by the subjects of any other Christian prince of state."³ The English Company was at first exposed to constant hostility from the French from Canada. But after the downfall of Quebec the trading system of the French was paralysed and the Hudson's Bay Company found itself at a position of vantage. Throughout the region comprised within the charter the Company possessed for nearly two hundred years the monopoly of the fur trade and succeeded in earning considerable profits for its members.

The history of the seventeenth and eighteenth centuries is replete with the activities of numerous exclusive companies. They were regarded by the go-ahead nations not only with favour and indulgence, but almost as necessary instruments for colonization and expansion. Hence we find the French, the Spanish, the Portuguese, the Dutch, and the English vying with each other in inaugurating and promoting exclusive companies. Besides the companies already mentioned,

¹ See Palgrave's 'Dictionary of Political Economy,' Vol. I, p. 18, and Le Rosignol's 'Monopolies, Past and Present.'

² A most interesting account of this Company will be found in George Bryce's 'The Remarkable History of the Hudson's Bay Company,' and in Palgrave's 'Dictionary of Political Economy,' Vol. II, p. 335.

³ Quoted in Le Rosignol's 'Monopolies, Past and Present,' p. 82.

there were other celebrated companies of which may be mentioned the Dutch East India Company, the Dutch West India Company, the French East India Company, the French West India Company, the Louisiana Company, the Virginia Companies of London and Plymouth, the South Sea Company and the Darien Company. It was virtually the age of Companies. In the words of Macaulay which were meant to apply to the English only, but which were really applicable to other important nations of Europe at the time, "The nation was in no humour to dispute the validity of the charters under which a few companies in London traded with distant parts of the world."¹ Some of these companies were actuated by purely commercial motives. Others had for their object not only the development of a profitable trade, but also settlement and colonization in the regions coming within the scope of their operations. In the case of the latter, the flag went in the wake of the trade and necessarily led to political complications.

The history of the British East India Company stands out unique and unparalleled both by reason of the magnitude of its operations, and the great part it has played in shaping the destinies of this country. Who ever could have thought when the first expedition set sail from Torbay that there was the unconscious beginning of a great and gigantic programme of empire-building? Yet so it has turned out to be. The first charter of the East India Company was granted on the 31st December, 1600. It constituted the adventurer, viz. George Earl of Cumberland and 215 knights, aldermen and burgesses, a body politic and corporate under the name of "The Governor and Company of Merchants of London trading to the East Indies." By this charter privilege was granted to the Company, with certain reservations, of trading to the East Indies, that is, to all places beyond the Cape of Good Hope and the Straits of Magellan, with power to export in each voyage £30,000 in gold and silver, also English goods for the first four voyages exempt from duties, and to re-export Indian goods in English ships. The charter was exclusive, prohibiting the rest of the

The British
East India
Company.

¹ See Macaulay's 'History of England,' Vol. III, pp. 293-302.

community from trading within the limits assigned to the Company, but granting to them the power, whenever they pleased, of bestowing licenses for that purpose.¹

The affairs of the Company were to be managed by a Committee of twenty-four, and one chairman. The charter was granted for a period of fifteen years, but on condition that if the trade did not appear to be profitable to the realm it might be annulled at any time under a notice of two years; if advantageous, it might be renewed for a further period of fifteen years. This restriction, however, was removed soon after. In 1609, the Company obtained a renewal of their charter, confirming all their preceding privileges, and constituting them a body corporate, not for fifteen years, or any other limited time, but for ever; at the same time providing that in the event of injury to the nation, their exclusive privileges could be terminated by a three years' notice. Unlike the other companies, the British East India Company was openly and avowedly a most exclusive monopoly. Although at first the Company was open to any merchant on payment of the prescribed entry fee, the Company's Directors so contrived it that presently the Company's control came to be exclusively confined to the earlier share-holders only. The share-holders had one common purse; there was no admission to the trade by merely paying a fine as in the case of the other companies; the only way of entering into the trade was by purchasing a share from one of the merchants who were in the business already—a very uncertain chance for there might be few ready to sell, specially if the business was profitable. None but the Company could sell the goods it imported and there was no restriction as to prices, so that the Company was free to raise them to any arbitrary figure and thereby make unreasonable profits at the expense of the purchasers.

Such was the character and constitution of the Company. No doubt it had been originally founded in the year 1600 as a regulated company. But steps were soon taken in 1612 and 1657 which transformed it into a joint-stock company. It soon established

¹ See Mill's 'History of British India,' Vol. I, p. 24.

several factories in different parts of India such as at Surat in 1609, at Madras in 1639, at Hooghly near Calcutta in 1650, and at Bombay in 1665. In the Spice Islands the interest of the English Company came into direct conflict with those of the Dutch. Eventually the English merchants were obliged to leave the Islands and seek fresh fields. In India, slowly but steadily the Company made its influence felt, and gradually strengthened its position by alliances with the Native Princes, and afterwards by war and conquest. But trouble arose at home. For as soon as the Company became prosperous and accounts of its large profits got home, the 'interlopers' who had by no means been inactive so far, were spurred on to take the aggressive in a pronounced manner. The independent merchants now took their stand on their constitutional rights and questioned the validity of the charter purporting to grant a monopoly in violation of the rights of free citizens. The Company claimed that the charter had been granted in the fitness of things. For the successful prosecution of Eastern trade it was necessary to have an association strong enough to negotiate with Native Princes, to adopt adequate offensive and defensive measures, whenever and wherever necessary, to enforce discipline amongst its agents and servants,¹ and to sweep away European rivals from the field. Free and open competition, howsoever right and proper it might be in other spheres of commerce and trade, would be entirely out of place in gigantic and hazardous enterprises of this description. There were great issues at stake and equally great were the risks and responsibilities involved, and the adventurers must receive sufficient encouragement in order that they might embark on their arduous enterprise. The only inducement that could attract them was the grant of exclusive privileges. All this was indeed true. At the same time the argument of the interlopers was unanswerable. They resented the monopoly of the Company and stood up for

¹ It is interesting to note that in 1624 the Company petitioned the king for authority to punish servants abroad by martial as well as municipal law. This prayer seems to have been readily granted and it appears that it was not even deemed necessary to go through any parliamentary proceeding for warranting the transfer to the Company of unlimited power over the life and liberty of citizens.

freedom and equality and no favour. Again and again they attempted to break in upon the chartered privileges of the Company. One such case of interloping was rendered famous by the altercation which it produced between the two houses of Parliament in 1666. Thomas Skinner, a merchant, fitted out a vessel in 1657. The agents of the Company seized his ship and merchandise in India, his house and the Island of Baretha which he had bought of the King of Jamby. They even denied him a passage home; and he was obliged to travel overland to Europe. The Lords took up Skinner's case, but the Company would not acknowledge their jurisdiction and appealed to the Commons who sent Skinner to the Tower. He obtained no redress though the Lords awarded him £5000.¹ Another well-known case is that of Sandys. Sandys had ventured a voyage on his own account to the East Indies. His ship "The Expectation" was arrested under Admiralty process, and he himself was sued on an action on the case of violating the franchise. The case was decided in favour of the Company, it being held that these charters were matters of royal prerogative and were not to be governed by the rules of common law.² In view of the constant troubles caused by the action of interlopers, the Company secured from King Charles II in 1661 a new charter confirming all the former privileges and granting the Company permission to make peace or war "with or against any princes or people not being Christians" and to seize the unlicensed persons and send them to England. In exercise of the rights under the charter the Company seized interlopers and sent them off to England where they were tried in the Admiralty Courts on charges of piracy or other heinous offences, and punished with great severity. All this contributed to rouse the hostility of the House of Commons which proceeded to appoint a Committee for investigating the subject. On the 16th January, 1690, the Committee reported that a new Company should be established, and established by Act of Parliament; and that the present Company should be allowed to carry on

¹ See *Skinner v. East India Co.* referred to in *Mostyn v. Fabrigas*, 1 Cowp. p. 1678.

² *East India Co. v. Sandys* (1684), *Skin.* pp. 197-8.

the trade exclusively till the new Company was established. In 1691 the House addressed the King to dissolve the Company and the matter was referred to a Committee of the Privy Council. In 1693 the King with the view of retaining the prerogative of granting charters or monopolies in his own hands, and also with the object of summarily settling the controversy, granted a new charter by letters patent conferring on the Company a monopoly for twenty-one years under certain conditions. The right of the King to grant such a franchise (in the face of the Declaration of Rights) was, however, questioned by the Commons, and it was strongly suspected that the Company had been adopting a policy of wholesale corruption for the purpose of winning over high officials on its side. An inquiry was ordered and it ended in the startling disclosure that no less than £90,000 had been expended on bribes in the year 1693,¹ of which it is said £10,000 was traced to the King.² Great indignation prevailed in the House of Commons, which proceeded to pass a resolution "that all the subjects of England have equal rights to trade to the East Indies unless prohibited by Act of Parliament." This gave a new impetus to the exertions of the interlopers who now became more active than ever. In the year 1698 they were able to float a new, or General, as distinguished from the London Company called "The General Society Trading to the East Indies." Thus commenced a period of rivalry and competition resulting in loss and injury to both, till in the year 1702 Parliament resolved for the welfare of the realm to bring about an union between the two. After long-protracted negotiations the two companies were finally amalgamated on a joint-stock basis, and in the year 1708 was established in their place "The United Company of Merchants of England trading to the East Indies." The exclusive privileges of the United Company were granted not only by the Crown but by Act of Parliament to hold good till 1726. By a later Act³ the period was extended to 1733. Thus Parliament finally committed itself to the declared policy

¹ Mill's 'History of British India,' Vol. I, p. 134.

² Cunningham's 'Growth of English Industry and Commerce (Modern Times),' Part I, p. 268.

³ 10 Anne C. 28.

of giving exclusive right to a corporation notwithstanding the right so often pressed on behalf of the citizens to free and unrestricted trade to the East Indies or to any part of the world. But this was not all. In the year 1718 it reaffirmed its decision empowering the Company to punish interlopers when caught trading under foreign commissions.¹

Armed with the franchise and with the support of the Parliament, demonstrated by repeated Acts in its favour, the Company set out afresh on its work. Before the period of its franchise came to an end the interlopers, however, again renewed their activities and the independent merchants clamoured for equal rights and an open trade for all. The Company was not to be put down in a hurry. In 1733 and 1744 the Company succeeded in obtaining fresh renewals of its charter. In 1766 a committee of inquiry was again appointed by the House of Commons to investigate the nature and causes of the complaints made against it, but it resulted in the reconstruction of the Company in 1773.

The East India Company since its inception had weathered many storms and fought many battles. It was no longer a merely trading body. It had formed important alliances with native Princes in India, taken an important part in the quarrels and conflicts that had arisen amongst them, and had slowly grown into a political power by no means to be despised. It was clear that its activities had now transcended the small sphere of traders and had entered upon the larger plane of Empire-builders. The victories of Clive had definitely raised the vision of an Empire, and the English people were not slow to perceive it. It was high time, therefore, that this fact should be recognized by Act of Parliament. By the Act of reconstruction in 1773 the Parliament recognized the political character of the Company and made provision for parliamentary control.

The political achievements of the Company do not concern us in the present treatment. The good and evil of the East India Company, its merits and

¹ 5 Geo. I. C. 21. These powers were further enforced and extended by 7 Geo. I. C. 21; 9. Geo. I. C. 26.

demerits, generally, are matters that pertain to a historical treatise. In giving the above short history my object has been merely to portray the chequered career of a company which affords a magnificent illustration of the forces at work for and against privileged companies. Despite repeated efforts the Company remained supreme and the open trade to India was not secured till 1813, and even then the Company was allowed to retain the monopoly of the trade to China until 1833. In 1833 it ceased to be a commercial body and was allowed to exist as the agent of the British Government for the administration of India,—a fitting end to the unique career of the Company. The different interests of the Company,—as sovereign of India on the one hand, and as monopoliser of trade and commerce on the other,—were in direct conflict with each other. As sovereign it was the clear duty of the Company to look alone to the interests of the people whom it governed ; as a trading monopoly its interest was to secure as large a profit as possible, even if that were to be secured at the expense and to the prejudice of the same people. This was a position that could not be allowed to continue. Moreover, the exclusive privilege of the Company while preventing the people of India from purchasing foreign articles and selling their indigenous products on advantageous terms also operated to shut out individual enterprise in Great Britain as was so often evidenced by the cases of ‘interlopers.’ It was, therefore, felt that from the English as well as the Indian point of view the time had come for the extinction of the East India Company as a trading monopoly.

LECTURE V.

THE LAW OF PATENTS.

Patents mark the beginning of the legal monopolies.

History of patents.

Conflict between the Sovereign and the people.

In my introductory lecture I have briefly indicated the place which patents occupy in the law of monopolies. In one sense patents may be looked upon as the beginning of the so-called legal monopolies. From very early times the English sovereigns used to grant "letters patent" or open letters to individuals or groups of individuals. We have found that it was usual for kings to grant charters to towns, as also to merchant guilds, craft guilds, regulated companies and joint-stock companies. It was also common for kings, as a mark of their favour, to grant to individuals by letters patent special privileges or special immunities from duties or restrictions. In fact, it was the prerogative of the king to issue charters or letters patent sealed with the great seal and addressed to the king's subjects at large declaring in favour of the particular individual grants of land, titles of nobility, liberties, franchises or any other privilege that could be granted. At times the royal prerogative came to be exercised in favour of individuals who paid money into the king's Treasury, receiving in lieu thereof valuable franchises. Under the Tudor and Stewart kings many such monopolies were granted by royal patents. Under Henry VIII they increased in number. Under Queen Elizabeth the innumerable monopolies by royal patent became a source of great public discontent. The patentees openly sold their franchises at high prices to others and there was a regular traffic going on in royal patents. Hence there arose a great conflict in the reign of Elizabeth between the sovereign and her people touching the abuse of monopolies. Let the historian speak of it in his own language. "Under cover of the loosely defined prerogative possessed or assumed by the Crown of regulating all matters relating to commerce, the queen had taken upon herself to make lavish grants to her courtiers of patents to deal exclusively in a multitude of articles, mostly common necessities of life. Coal, leather, salt, oil, vinegar, starch, iron, lead, yarn,

glass and many other commodities were in consequence only to be obtained at ruinous prices. The grievance was first mooted in Parliament in 1571 by a Mr. Bell: but he was at once summoned before the Council, and returned to the House "with such an amazed countenance, that it daunted all the rest." After the lapse of twenty-six years the Commons ventured in 1597 to present an address to the Queen on the same subject, to which she replied, through the Lord Keeper, that she 'hoped her dutiful and loving subjects would not take away her prerogative, which is the choicest flower in her garden and the principal and head-pearl in her crown and diadem; but would rather leave that to her disposition, promising to examine all patents and to abide the touchstone of the law.' In spite of these fair words, the abuse far from being abated, rose to a still greater height. So numerous were the articles subject to monopoly, that when the list of them was read over in the House in 1601, an indignant Member exclaimed, 'Is not bread amongst them? Nay, if no remedy is found for these, bread will be there before the next Parliament!' A Bill 'for explanation of the common law in certain cases of letters-patent' was introduced by Mr. Lawrence Hyde, and was debated with unprecedented warmth for four days. The ministers and courtiers who endeavoured to support the prerogative, were overborne by a torrent of indignant and menacing eloquence. The populace openly cursed the monopolies and declared that the prerogative should not be suffered to touch the old liberties of England. Seeing that resistance was no longer politic, or even possible, Elizabeth with admirable tact sent a message to the House that 'understanding that diverse patents which she had granted had been grievous to her subjects, some should be presently repealed, some superseded, and none put in execution, but such as should first have a trial, according to the law, for the good of the people.' Robert Cecil, the Secretary, added the more direct assurance that all existing patents should be revoked, and no others granted for the future."¹

¹ Taswell-Langmead's 'English Constitutional History,' pp. 495-497.

Darcy v. Allein.

The Statute of
Monopolies

reaffirmed the
Common Law.

The present law of
patents is sub-
stantially that con-
tained in the Sta-
tute with differ-
ences as to details.

Then followed the case of *Darcy v. Allein*,¹ in which the principle of common law as to validity of patents as an exception to monopolies was fully discussed and clearly laid down (see Lecture I). The principle of exception was soon afterwards adopted by the Statute of Monopolies² in Sections 5 and 6 thereof. The statute, therefore, did not create, but simply reaffirmed and regulated the power of the crown in granting patents to true and first inventors. It declared all grants of monopolies whatsoever apart from those already in existence to be void save those exempted by the following proviso: "Provided also that any declaration beforementioned, shall not extend to any letters patent and grants of privilege for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm to the true and first inventor and inventors of such manufactures which others at the time of making such letters patent and grants shall not use, so as also they be not contrary to the law nor mischievous to the State by raising the price of commodities at home or hurt of trade or generally inconvenient, the said fourteen years to be accounted from the date of the first letters patent or grants of such privilege hereafter to be made, but the same shall be of such force as they should be if this Act had never been made and of none other." The law of patents as it stands to-day is substantially the same as laid down in the above section. The difference is one of detail only. It has been elaborated and rendered more definite and pre-

In the Long Parliament Sir John Culpepper indulged in the following vigorous language :—They are a nest of Wasps—a swarm of Vermin which have over-swept the land. Like the Frogs of Egypt, they have gotten possession of our dwellings and we have scarce a room free from them. They sup in our cup ; they dip in our dish ; they sit by our fire. We find them in the dyefat, wash-bowl and powdering tub. They share with the butler in his box. They will not bait us a pin. We may not buy our clothes without their brokerage. These are the leeches that have sucked the common wealth so hard that it is almost hectical. Mr. Speaker I have echoed to you the cries of the kingdom. I will tell you their hopes. They look to Heaven for a blessing on this Parliament.

The monopolies referred to in the above declaration were nothing more than the royal patents. Restriction of competition under them was effected not by the act of the individuals, but the exclusive character of the grant.

¹ (1602) Noy. 173, s.c. 74 Eng. Rep. 1131.

² Statute of Monopolies (1624) entitled "An Act concerning Monopolies and Dispensations with Penal Laws and Forfeiture thereof."

cise by numerous decisions. Besides, the present law prescribes distinct remedies as well as specific forms and procedure for safeguarding patent right. Sir Edward Coke in his lucid commentary on sections 5 and 6 of the Statute of Monopolies points out seven outstanding features to be noted regarding the provisions contained therein. He says: "Firstly, it must be for twenty-one years or under.¹ Secondly, it must be granted to the first and true inventor. Thirdly, it must be of such manufactures which any other at the making of such letters patents did not use; for albeit it were newly invented, yet if any other did use it at the making of the letters patents, or grant of the privilege, it is declared and enacted to be void by this Act. Fourthly, the privilege must be substantially newly invented; but if the substance was *in esse* before, and a new addition thereunto though that addition make the former more profitable, yet it is not a new manufacture in law; and so was it resolved in the Exchequer Chamber, Pasch 15 Eliz. in Bircot's case for a privilege concerning the preparing and melting, etc., of lead ore; for there it was said that that was to put but a new button to an old coat and it is much easier to add than to invent. And there it was also resolved that if the new manufacture be substantially invented according to law, yet no old manufacture in use before can be prohibited. Fifthly, nor mischievous to the State by raising of prices of commodities at home. In every such new manufacture that deserves a privilege there must be *urgens necessitas* and *evidens utilitas*. Sixthly, nor to the hurt of trade. This is very material and evident. Seventhly, nor generally inconvenient. There was a new invention found out heretofore, that bonnets and caps might be thickened in a fulling mill, by which means more might be thickened and fulled in one day than by the labours of fourscore men who got their livings by it. It was ordained that bonnets and caps should be thickened and fulled by the strength of men, and not in a fulling mill for it was holden inconvenient to turn so many labouring men to idleness. If any of these seven qualities fail, the privi-

Coke's commentary
on Sections 5 and 6
of the Statute of
Monopolies.

¹ It is fourteen years in the case of Sec. 6.

lege is declared and enacted to be void by this Act ; and yet this act, if they have all these properties, set them in no better case, than they were before this Act."

Much of Coke's commentary has now become obsolete.

It will be apparent as we proceed that a good portion of this famous commentary of Sir Edward Coke's has now become obsolete and is not good law at the present day. For instance, it could scarcely be imagined now that a fulling mill would be deemed to be against public policy because forsooth "it was ordained that bonnets and caps should be thickened and fulled by the strength of men," or because "it was holden inconvenient to turn so many labouring men to idleness." This antiquated view has been overruled in *Boulton v. Bull*.¹ Sir Edward Coke also lays down that it is a necessary ingredient in every patent that it shall have *evidens utilitas*. If by "utility" is meant the commercial utility of a particular invention, the law is quite clear that it has no direct effect on the validity of a patent, although it does, no doubt, affect the value of the patent. The real test of validity of a patent is that it shall be new. Probably, what Sir Edward Coke meant by *evidens utilitas* is that it must be proved that the invention put forward is really new and that in actual working it is found to do the special work which is claimed for it, in other words, the invention must justify its existence as a new invention. Further, Sir Edward Coke lays down that an improvement on something known cannot be the subject matter of a patent and quotes *Bircol's Case*² in support of his proposition. This proposition is no longer good law. It has been overruled again and again.³ Indeed, if this were regarded as good law many existing patents would be thrown out of protection. Apart from the points indicated above, the commentary of Sir Edward Coke remains true to this day ; and the special value of it lies in the concluding portion of it which makes it clear that the statute of

Boulton v. Bull.

What is meant by "utility" ?

¹ (1795) 2 Hy. Bl. 463 s.c. 126 Eng. Rep. 651.

² (1573) 3. Co. Inst. 184, Ex. Ch.

³ *Raislon v. Smith* (1865) 11 H.L.C. 223, s.c. 11 Eng. Rep. 1318; *Boulton v. Bull* (1795) 2 Hy. Bl. 463, 488; *Morris v. Branson* 1776, cited 2 Hy. Bl. 489 s.c. 126 Eng. Rep. p. 664. See also Halsbury's 'Laws of England,' Vol. 22, p. 138.

monopolies does not create, but only preserves the right which previously existed at common law to grant letters patent.

Thus it appears that letters patent confer a franchise.¹ No one is entitled to a patent as of right. The principle on which the king may grant the franchise was distinctly laid down in the great case of *Darcy v. Allein*² and will bear repetition in this connection: "Where a man *had by his own charge and industry or by his own wit and invention*, brought any new trade into the realm, that was not used before, and that for the good of the realm, the king might grant him a monopoly patent for some reasonable time until the subjects might have learned the same, in consideration of the good that he brought by his invention to the common wealth, otherwise not." It was also laid down in the case of *Millar v. Taylor*³ that the inventor is not in the same position as an author. An author has a natural right of property in the production of his mind, for an author creates his work. On the other hand, it is said that an inventor creates nothing. He merely discovers what was already there and exercises his ingenuity in applying it to some useful purpose in the shape of a machine or an article of manufacture.⁴ In order, therefore, that he may enjoy the exclusive⁵ use of it for a time he must apply to the crown for a patent.

Letters patent confer a franchise. No one entitled to patent as of right. Principle on which the franchise is granted.

¹ See *Reg. v. County Court Judge of Halifax* L. R. (1891) 1 Q. B. 793. "The right of the Crown to grant letters patent to a person for the sole use of any art first invented by him is a part of the ancient royal prerogative. This right has been limited by the Statute of Monopolies, but the grant is founded on the common law right of the Sovereign"—*per* Pollock B. at p. 796.

² (1602) Noy 173 s.c. 74 Eng. Rep. 1131.

³ (1769) 4 Burr. 2303 s.c. 98 English Rep. 201.

⁴ Observe that a contrary opinion is expressed by Yates J. in the same case *Millar v. Taylor* (1769) 4 Burr. p. 2386. "The whole claim that an author can really make is on the public benevolence, by way of encouragement, but not as an absolute coercive right. His case is exactly similar to that of an inventor of a new mechanical machine; it is the right of every purchaser of the instrument to make what use of it he pleases. It is, indeed, in the power of the Crown to grant him a provision for a limited time, but if the inventor has no patent for it every one may make it and sell it." See also the observations of Aston J. at p. 2348.

⁵ Note that the right which a patentee has by virtue of his patent is a chose in action—[See *Re Heath's Patent* (1912) W. N. 137]—created by the exercise of the royal prerogative and is entirely distinct from the right of property in a chattel created under it. The letters patent do not give the patentee any right to use the invention, that is, a right which he would have as effectually if there were no letters patent at all. What the letters patent

The Indian Patents and Designs Act. Important provisions bearing on the fundamental features of the monopoly of patents, discussed.

The law relating to patents in India is at present governed by the Indian Patents and Designs Act (Act II of 1911) which substantially adopts the consolidating English Act (7 Edward VII C. 29) with some minor variations, such as may be necessary for adapting it to the conditions of this country. The prerogative of the Crown to grant patents on application has been kept intact by Sec. 79 of the Act (Act II of 1911) which provides as follows: "Nothing in this Act shall take away, abridge or prejudicially affect the prerogative of the Crown in relation to the granting of any letters patent or to the withholding of a grant thereof." An application¹ for a patent may be made by any person, whether he is a British subject or not and whether alone or jointly with any other person. The application must be made in the prescribed form, and must be left at the Patent Office² in the prescribed manner. It must contain a declaration to the effect that the applicant is in possession of an invention, whereof he, or, in the case of a joint application, one at least of the applicants, claims to be the true and first inventor, or the legal representative or assign of such inventor and for which he desires to obtain a patent. Where the true and first inventor is not a party to the application, the application must contain a statement of his name, and such particulars, for his identification as may be prescribed, and the applicant must show that he is the legal representative or assign of such inventor. The application must be accompanied by the prescribed fee and by a specification. The specification must particularly describe and ascertain the nature of the invention and the manner in which the same is to be performed. Where the Controller³ deems it desirable he may require that suitable drawings shall be supplied with the speci-

confer is the right to exclude others from manufacturing in a particular way, and using a particular invention (*Edwards & Co. v. Picard* (1909) 2 K. B. 903, 905 C. A. citing *Steers v. Rogers* (1893) 10 R. P. C. 245, 251; (1893) A. C. 232, 235). See Halsbury's 'Laws of England,' Vol. 22, p. 127.

¹ Secs. 3 and 4 of the Act.

² The Governor General in Council may provide for the purposes of this Act, an office which shall be called, and is in this Act referred to as, the Patent Office—Sec. 55, sub-sec. (1).

³ The Patent Office shall be under the immediate control of the Controller of Patents and Designs, who shall act under the superintendence and direction of the Governor-General in Council, Sec. 55, sub-sec. (2).

cation. The specification must commence with the title and must end with a distinct statement of the invention claimed or alleged to constitute an invention. If in any particular case the Controller desires that an application should be further supplemented by a model or sample of anything illustrating the invention, such model or sample as he may require shall be furnished before the acceptance of the application, but such model or sample shall not be deemed to form part of the application. See also sec. 20 sub-sec. (1) which provides as follows: There shall be kept at the Patent Office a book called the Register of Patents wherein shall be entered the names and addresses of grantees of patents, of licenses under patents, and of amendments, extensions, and revocation of patents, and such other matters affecting the validity or proprietorship of patents as may be prescribed. Sec. 38 of the Act deals with the question of 'novelty.' An invention shall be deemed a new invention if it has not, before the date of the application for a patent therein, been publicly used in any part of British India, or been made publicly known in any part of British India, and if the inventor has not by secret or experimental uses made direct or indirect profits from his invention in excess of such an amount as the Court or the Governor-General in Council, as the case may be, may, in consideration of all the circumstances of the case, deem reasonable. But the public use or knowledge of an invention, before the date of the application for a patent thereon, is not deemed a public use or knowledge within the meaning of this Act if the knowledge has been obtained surreptitiously or in fraud of the true and first inventor, or has been communicated to the public in fraud of such inventor or in breach of confidence, provided that such inventor has not acquiesced in the public use of his invention, and that, within six months after the commencement of that use, he applies for a patent. Sec. 21 of the Act lays down that, subject to any conditions which the Governor-General in Council may have imposed¹ a patent shall have to all intents the like effect as

¹ See Sec. 77 of the Act which gives the Governor-General in Council the power to make such rules as he thinks expedient subject to the provisions of the Act, including, among others, rules for regulating the practice

against His Majesty as it had against a subject provided that the officers or authorities administering any department of the service of His Majesty may by themselves, their agents, contractors or others, at any time after the application, use the invention for the services of the Crown on such terms as may either before or after the use thereof, be agreed on, with the approval of the Governor-General in Council, between those officers or authorities and the patentee, or in default of agreement, as may be settled by the Governor-General in Council after hearing all parties interested.

The form prescribed for application for grant of patent—analysed and discussed.

I have put the above sections together and referred to them first because they reveal the fundamental features of the monopoly of patents as it exists at present. The rest of the Act, with the exception of a few sections, concerns itself with details of procedure, etc. Another way of studying those fundamental features is to look at the form prescribed for the application for grant of a patent. In exercise of the powers conferred by secs. 57 and 177 (1) of the Act the Governor-General in Council has framed rules (Indian Patents and Designs Rules, 1912). Form I Sched. II of the Rules is prescribed for application for a patent under sec. 3 when the true and first inventor is sole or joint applicant. Under this form the applicant (or applicants, as the case may be) must declare, first, that he is in possession of an invention of which the title has to be given; secondly, that he claims to be the true and first inventor thereof; thirdly, that the invention is not in use by any other person; fourthly, that the specification filed with the application is, or any amended specification which may thereafter be filed will be, true of the invention to which the application relates.

Three things essential for a patent

1. There must be an invention.

Invention explained.

Thus the three most essential things for a patent are that there must be an 'invention,' that the patentee must be the true and first inventor, and the 'invention' must not have been in use by any other person. Now what is an invention? An invention is not the same thing as a discovery. The discovery of X-

rays for instance is a most important addition to scientific knowledge. But it is a discovery pure and simple, until it comes to be applied by means of an apparatus to various uses, well known to medicine and surgery, when it becomes an 'invention.' So with wireless telegraphy, radium and the like. If a man does nothing more than discover that a known machine can produce effects which no one before him knew could be produced by it, his discovery, however great and useful, is not a patentable invention. To entitle a patentee to maintain his patent, he must make some addition not only to knowledge but to previously known inventions, and must produce either a new and useful thing or result, or a new and useful method of producing an old thing or result.¹

An invention, as defined by the Act, 'means any manner of new manufacture, and includes an improvement and an alleged invention.' The word 'manufacture' is interpreted in the Act to "include any art, process, or manner of producing, preparing or making an article, and also any article prepared or produced by manufacture." The word, therefore, comprehends not only *productions* but also the *means or method* of producing them, in other words, in addition to the article produced, it will comprehend a new machine, or a new combination of machinery, as well as a new process or an improvement in an old process.² This

'Manufacture' includes a new substance or composition, or a new method.

¹ *Lane Fox v. Kensington Electric Light Co.* (1892) 3 Ch. D. 424, at pp. 428-429. "The discovery that a known thing—such, for example, as a Plante battery—can be employed for a useful purpose for which it has never been used before is not alone a patentable invention; but, on the other hand, the discovery how to use such a thing for such a purpose will be a patentable invention if there is novelty in the mode of using it, as distinguished from novelty of purpose, or if any new modification of the thing or any new appliance is necessary for using it for its new purpose, and if such mode of user, or modification, or appliance involves any appreciable merit."—*Per* Lindley L. J., at p. 429.

² *Per* Lord Westbury in *Ralston v. Smith*, 11 H. L. C. 223 at p. 246 s.c. 145 R.R. 140 s.c. 11 Eng. Rep. 1318. See the observations of Lord Cranworth at p. 251: "It is not every useful discovery that can be made the subject of a patent but you must show that the discovery can be brought within the fair extension of the words a 'new manufacture.' . . . Now that is a very useful discovery, but it would be strange to say that that is a new manufacture, and that, therefore, I am to be deprived of the most useful way of employing my roller. There is nothing new in the invention, except that I now know what I did not know before, that by a particular use of it I shall obtain a result which I did not before know that I could obtain." See also the observation of Eyre L. C. J. in *Boulton and Watt v. Bull* (2 H. Bl. 463 at pp. 492-493 s.c. 126 Eng. Rep. 651): "When the effect

point has been clearly brought out by Abbott C. J. in *The King v. Wheeler*,¹ thus: "the word 'manufactures' has been generally understood to denote either a thing made, which is useful for its own sake, and vendible as such, as a medicine, a stove, a telescope, and many others, or to mean an engine or instrument, or some part of an engine or instrument, to be employed, either in the making of some previously known article, or in some other useful purpose as a stocking-frame, or a steam engine for raising water from the mines. Or it may perhaps extend also to a new process to be carried on by known implements, or elements, acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better and more useful kind. But no merely philosophical or abstract principle can answer to the word manufacture. Something of a corporeal and substantial nature, something that can be made by man from the matters subjected to his art and skill, or at the least some new mode of employing practically his art and skill, is requisite to satisfy this word. A person, therefore, who applies to the Crown for a patent, may represent himself to be the inventor of some new thing, or of some new engine or instrument. And in the latter case he may represent himself to be the inventor of a new method of accomplishing that object, which is to be accomplished by his new engine or instrument, as was the case of Watt's patent,² in which he represented himself to be the inventor of a new method of lessening the consumption of steam and fuel in fire engines, and by his specification he described certain parts to be used in the construction of fire engines. Or supposing a new process to be the lawful subject of a patent, he may represent himself

produced is some new substance or composition of things, it should seem that the privilege of the sole working or making ought to be for such new substance or composition without regard to the mechanism or process by which it has been produced, which though perhaps also new will be only useful as producing the new substance. . . . When the effect produced is no new substance or composition of things, the patent can only be for the mechanism if new mechanism is used, or for the process, if it be a new method of operating, with or without old mechanism, by which the effect is produced." Cf. *Kopp v. Rosenwald* (1902) 19 R. P. C. 205.

¹ 2 B. and Ald. 345 at p. 349 s.c. 106 Eng. Rep. 392.

² 8 T.R. 95.

to be the inventor of a new process, in which case it should seem that the word method may be properly used as synonymous with process."

The question as to the scope of the term 'manufacture' came up as early as the year 1815 in the case of *Wood v. Zimmer*¹ in connection with a patent for a new mode of making *verdigrease*, and the discussion turned on whether the term 'manufacture' could be applied to a new process or method, as distinguished from a new substance. In the report of the case will be found a note² containing an interesting discussion of the subject, and reference is made to the dictum of Eyre C.J. in *Boulton & Watt v. Bull*³ laying down that new methods of manufacturing articles in common use "may be said to be new manufactures in one of the common acceptations of the word. . . . Three-fourths of the patents granted since the Statute (of James) are for methods of operating and of manufacturing, producing no new substance, and employing no new machinery." All this discussion has been now rendered unnecessary by reason of the fact that the principle embodied in the above cases has been crystallized in the defining section of the Act. *In the matter of an alleged invention of A. E. Short*⁴ it was contended on behalf of the applicant that the term 'manufacture' cannot apply to the *process* alone but means the process taken together with the article produced thereby and that, therefore, the term 'invention' cannot be confined to the process alone. On the other side, it was argued that the term manufacture is intended to draw a distinction between the invention of a new process or method of producing an *old substance*; and that where an old substance like shellac is produced by a new process then it is the new process which is the new manufacture, whereas when a new substance is produced then it is the new substance or new article which is the new manufacture. It was not necessary in that case to express a final opinion on these points. But the court was inclined to take the view that, reading the definition

Wood v. Zimmer.

Boulton and Watt v. Bull.

In the matter of an alleged invention of A. E. Short

¹ Holt (N.P.) p. 58 s.c. 17 R.R. 605.

² *Ibid.*, at p. 65.

³ 2 Hy. BL. 463 at p. 494 s.c. 126 Eng. Rep. 651.

⁴ I.L.R. 23 Cal. 702.

of the term manufacture in the light of the English authorities, it was intended that when an old or known substance is produced in a new way by a newly discovered art or process, then the term 'manufacture' may be applied to the new process.

Patentable invention involves a discovery, but the discovery must result in a 'new thing'

It will appear from the above that there must be more than a mere discovery to constitute a patentable invention. There must of course be a discovery. But such discovery must result in a new 'thing' possessing utility. I use the word 'thing' advisedly because, as ordinarily used, the word implies some concrete object as opposed to a mere abstract idea. In technical phraseology, the expression 'new thing' is conveyed by two separate terms, viz., 'novelty' and 'subject-matter,' the subject-matter referring to the concrete manifestation of the new discovery.

Subject-matter and Novelty.

Considerable confusion has arisen as to the signification of the term 'subject-matter.' The confusion is partly due to the fact that in a good many cases it has been used interchangeably with 'novelty,' which is practically an invariable factor in an invention. As has been observed above an invention is not a mere discovery, but implies something more. In the words of Eyre L.C.J.¹ "there can be no patent for a mere principle but for a principle so far embodied and connected with corporeal substances as to be in a condition to act, and to produce effects in any art, trade, mystery or manual occupation." Such embodiment or concrete manifestation whether it be in the form of a substance or a process or method is designated 'subject-matter.' It often happens, therefore, that the validity of a patent fails for what is called want of subject-matter. But more often than it ought to, the plea of want of subject-matter is raised when it appears upon examination that in reality what is meant is that the patent fails for want of novelty. This confusion should be avoided as far as possible, and novelty and subject-matter viewed as independent and separate factors necessary for a patent. "In con-

¹ *Boulton and Watt v. Bull* 2 H.Bl. 463 at p. 495, s.c. 126 English Rep. 651.

² Thus a business scheme even when it involves ingenuity, novelty and utility is not a proper subject-matter, e.g. a new method of indexing finger prints. *Ward's Application*, 29 R.P.C. 79.

sidering subject-matter, novelty is assumed; the question is whether, assuming the invention to be new, it is one for which a patent can be granted. In considering novelty, the invention is assumed to be one for which a patent can be granted if new, and the question is whether on that assumption it is new"¹

The law on this subject seems on the face of it fairly simple. But the application of it to individual cases is fraught with some difficulty. Questions of some nicety are apt to arise and it is, therefore, necessary to look into the case-law which has defined with some accuracy what may be the subject-matter of a patent. It has been held that the discoverer of a new principle or new idea as regards any existing art or manufacture, who shows a mode of carrying it into practice, as by a machine, may patent the combination of principle and mode, although the idea, or the machine would not alone be the proper subject of of a patent.² Here there is the discovery of a new principle followed by a novel application of it in some concrete form. A novel application of an old principle would equally justify the grant of a patent. In *Dangerfield v. Jones*³ it was laid down that if a person having a particular purpose in view takes the general principles of mechanics, and applies one or other of them to a manufacture to which it has not previously been applied, that is a sufficient ground to warrant an application for a patent, provided that the manufacture in question be new, desirable, and of public utility.⁴ So in *Brooks v. Lamplugh*,⁵ the plaintiff utilised the principle of the "trussed beam" already well known for other purposes for supporting bicycle saddles; it was held that the employment of the old principle was attended by results which were sufficiently new and ingenious to form a fit subject for a patent. As observed by Jessel M.R. in *Hinks v. Safety Lighting Co.*,⁶ "where a slight alteration in a

Case-law.

¹ Per Lindley L.J. in *Gadd v The Mayor etc. of Manchester* (1892) 9 R.P.C. at p. 525. As Terrell observes, "strictly speaking, subject-matter is a question of law, while novelty is a question of fact." Terrell on Patents, 5th Ed. p. 39.

² *Otto v. Limford* 46 L.T.N.S. 35; *The Househill Coal and Iron Co. v. Neilson* (1843) 1 W.P.C. 679; s.c. 9, C. & F. 788, s.c. 8 Eng. Rep. 616; *The British Vacuum Cleaner Co. v. Suction Cleaners Ltd.* (1904) 21 R.P.C. 303.

³ 13 L.T. 142.

⁵ (1898) 15 R.P.C. 33.

⁴ On the question of utility see p. 109 *infra*.

⁶ (1876) 4 Ch. D. 607, 615.

combination turns that which was practically useless before into that which is very useful and very important, judges have considered that though the invention was small yet the result was so great as fairly to be the subject of a patent.” Another class of cases turns on the new combination of old materials. If the result of such combination is a new article, a better article or a cheaper article, than that produced before by the old method, such combination is an invention or manufacture and may, therefore, be the subject-matter of a patent.¹ A valid patent for an entire combination for a process gives protection to each part thereof, which is new and material for that process.² Again an arrangement of apparatus, so constructed as to bring into operation a well-known dynamic agent, so as to produce a useful effect or a result of apparent utility, constitutes an invention and a good subject-matter for a patent. But the combination or arrangement must be new in the sense of having required the exercise of the inventive faculty, or thought and study.

In every case of this description, says Chelmsford L.C., one main consideration seems to be whether the new application lies so much out of the tract of the former use as not naturally to suggest itself to a person turning his mind to the subject, but to require some application of thought and study.³ Thus a patent cannot be granted for putting known contrivances to a use that is new but analogous to the uses to which they were previously put, without overcoming any fresh difficulties.⁴ As Cockburn L.C.J. observes:⁵ “The question in every case is one of degree, whether

¹ *Crane v. Price* 1 Web. P.C. 303. *The Anti Vibration Incandescent Lighting Co. v. Crossley* (1905) 22 R.P.C. 441.

There may also be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials. *Hill v. Thompson and Foreman*, 3 Mer. 622 s.c., 36 English Rep. 239; cited in *Elgin Mills Co. v. Muir Mills Co.*, I.L.R. 17 All. 490 (494); *Lakshpat Rai v. Kishan Das* (1913) 16 A.L.J. 941; 48 Ind. Cas. 450.

² *W. Butler v. Adamji Bahura* I.L.R. 26 All. 96, following *Parkers v. Stevens* (1896) L.R. 8 Eq. 358 at p. 367.

³ *Penn v. Bibby*, L.R. (1866) 2 Ch. Ap. Cases 127; 36 L.J. Ch. 455; 15 L.T. 399; 15 W.R. 208; *Kinmond v. Jackson* (1877) 1 C.L.R. 66.

⁴ *In re Merten's Patent* (1914) 31 R.P.C. 373; *Gadd v. The Mayor of Manchester* (1892) 9 R.P.C. 516.

⁵ *Harwood v. Great Northern Railway Co.* 2 B. & S. 208, quoted by Chelmsford L.C. in *Penn v. Bibby* (1866) 2. Ch. Ap. Cases 127 at p. 136.

the amount of affinity or similarity which exists between the two purposes is such that they are substantially the same, and that determines whether the invention is sufficiently meritorious to be deserving of a patent." What will constitute the merit of the invention is a matter of some difficulty. In some cases it has been urged that where there has been a long-standing demand for a certain article and some one succeeds in satisfying the demand, that in itself argues merit in the invention. But this view does not appear to have found favour; for commercial success may often be due to adventitious circumstances and cannot furnish a safe criterion of merit; thus we get back to the principle already enunciated, viz. an invention connotes real ingenuity in overcoming difficulties.¹ The attainment of a better result than had been previously attained constitutes a new result so as to make an instrument a new invention.² Further, when it is common knowledge that certain things have certain properties and act in a certain way, or that a class of processes yields a particular kind of result, the selection of the best of such class or of the conditions under which the process in question will yield the best of results will amount to a patentable invention. For instance, it was well known that all solutions of potassium cyanide would dissolve gold out of its ores to a certain extent. It was found that a very dilute solution was far superior to a strong solution and it was held that the selection of the very dilute solution was good subject-matter for a patent.³ Again, it was known that hydrated oxides of iron would absorb sulphuretted hydrogen from coal gas. It was also known that sulphuret of iron produced by the action of sulphuretted hydrogen upon hydrated oxide of iron, would be reoxidised by being exposed to the action of atmospheric air. But it was not known that when the sulphuret was produced by exposure of hydrated oxide of iron to the action of

¹ *Gosnell v. Bishop* (1888) 5 R.P.C. 155; *Lyon v. Goddard* (1893) 10 R.P.C. 334.

² *Thompson v. Moore* 23 L.R. Ir. 599. See also *Curtis v. Platt* 35 L.J. Ch. 852 and *Proctor v. Bennis* 36 Ch. D. 740.

³ *Cassel Gold Extracting Co. v. Cyanide Gold Recovery Syndicate* (1895) 12 R.P.C. 232 C.A.; Halsbury's 'Laws of England' Vol. 22, p. 139.

sulphuretted hydrogen mixed with coal gas, the re-oxidation of the iron might not be prevented by the cyanogen, compounds of ammonia and tarry matter which would be mixed with it. So it was held in the same case that a patent might be granted for re-oxidising the iron by exposure to the air after it had been used in the purification of coal gas.

Adaptation of old materials or old processes.

A large number of cases turn on the adaptation of old materials or old processes to new cases, but in a manner which although involving skill does not involve ingenuity. In fact every adaptation involves some skill; it is only a matter of degree. But ingenuity alone in the sense above indicated can establish for the article or the process the claim to a patent. Thus the use of solid naphthaline, an article already in existence for enriching gas, could not be the subject-matter of a patent though solid naphthaline had not been used, the use of other varieties of naphthaline being well known for the same purpose.¹ Similarly where C springs had been formerly employed for the back of a carriage, the employment of them for the forepart of a carriage was held to imply no ingenuity sufficient for a patent.² In *Thompson v. James*³ use of hoops made of steel watch springs for suspending from the waist and firming a petticoat in place of hoops of whalebone, cane and other substances which had long been used by the ladies was held not to be patentable. In *Rushton v. Crawley*⁴ the plaintiff had obtained a patent for the use of animal fibre, by preference Russian wool, or wool of a coarse texture in the manufacture of artificial hair to be made up as ladies' head dresses and for upholstery, and other like purposes. Sir R. Mallins V.C. in refusing an injunction for infringement, observed: "The use of a new material to produce a known article is not the subject of a patent, but there must be some invention, something really new, something more valuable to the public than the simple use of a new material to produce a known article." It follows that not every

¹ *The Albo-Carbon Light Co. v. Kidd* (1887) 4 R.P.C. 535. See also *McLay v. Lawes & Co.* (1905) 22 R.P.C. 199.

² *Morgan v. Windover* (1890) 7 R.P.C. 131.

³ 32 Beav. 570 s.c. 55 Eng. Rep. 224.

⁴ L.R. (1870) 10 Eq. 522 at p. 529.

adaptation or combination is a fit subject-matter of a patent.¹ In *The Elgin Mills Co. v. Muir Mills Co.*² the inventor claimed as the subject-matter of a patent "a new general combination of a tent" by which he presumably meant a combination of features found in previously existing tents so as to form what was practically a new tent. The Court quoting the words employed in *Saxby v. Gloucester Waggon Co.*³ held that the combination in question did not require "an exercise of such an amount of skill and ingenuity as to entitle it to the protection of an exclusive grant" although counsel for the inventor strenuously contended that the new tent was an improvement on pre-existing tents and, therefore, an 'invention.' Thus though an invention includes an improvement it does not by any means follow that every improvement is an invention.

Under Section 2 clause (8) of the Act, invention 'Improvements.' includes an 'improvement.' But what sort of improvement will come within the meaning of an invention does not appear from the Act. For a clear understanding of the essentials of a patentable improvement we have to resort to case-law. There is a variety of cases on the subject but questions as to subject-matter, novelty, utility and improvements have been discussed in these cases with no very great regard to distinction or accuracy. In fact, it seems no clear line of demarcation is possible, for the connotations of the several terms overlap to a very large extent. It is clear, however, that an improvement involves a substantial and meritorious advance upon the old state of affairs, whether it was a contrivance, a process or method, or a combination.

Another essential factor that makes an invention patentable within the meaning of the Act is 'utility.'⁴ Utility. Utility has not been defined in the Act. We must, therefore, again turn to case-law for its meaning. It has a technical significance in the law of patents and must be distinguished from commercial utility⁵

¹ *Williams v. Nye* (1889) 7 R.P.C. 37; *Wood v. Raphael* (1896) 13 R.P.C. 730; *The British United Shoe Machinery Co. v. Fussell* (1908) 25 R.P.C. 631.

² I.L.R. 17 All 490 (496).

³ L.R. 7 Q.B.D. 305 at p. 312.

⁴ *Vide* p. 96 *supra*.

⁵ *The Badische Anilin and Soda Fabrik v. Levinstein* (1887) 4 R.P.C.

or the quality of securing advantage measurable by money value. On analysis, utility appears to signify the quality or capability of securing a particular end or object in view : in other words when a method, process, combination, or contrivance, secures the object which it has in view, it is said to have utility. Utility in the law of patents does not mean either abstract utility or comparative or competitive utility, or commercial utility, but, as applied to an invention it means that the invention is better than what was previously known on the subject; it may be better in some respects only and not necessary in every respect. For instance, an article which is good, though not so good as that previously known but which can be produced more cheaply by another process, is better in that it is better in point of cost although not so good in point of quality. An invention is useful when the public are thereby enabled to do something which they could not do before or to do in a more advantageous manner something which they could do before.¹ The test of utility is whether the object sought to be attained by the patentee can be attained and is practically useful at the time when the patent is granted. "Utility," Lindley L.J. observes,² "is often a question of degree and always has reference to some object. Useful for what? is a question which must always be asked, and the answer must be, Useful for the purposes indicated by the patentee." A very small amount of utility is sufficient to support a patent.³

The above cases go to show what constitutes an 'invention.' If the requirements of an 'invention' are satisfied the applicant for the patent may upon that footing declare that he is the 'true inventor.' But that is not all. He has also to satisfy the Crown that he is the 'first inventor.'⁴ This is in effect the same

When the requirements of an 'invention' are satisfied the applicant must next satisfy the Crown that he is the first inventor.

449; *The Sunlight Incandescent Gas Lamp Co. v. The Incandescent Gas Light Co.* (1897) 14 R.P.C. 457.

¹ *Welsbach Incandescent Gas Light Co. v. New Incandescent (Sunlight Patent) Gas Light Co.* 17 R.P.C. 237; (1900) 1 Ch. 843 at p. 850.

² *Lane Fox v. Kensington and Knights Bridge Electric Lighting Co.* (1892) 3 Ch. 424 at p. 431. See also *Morgan v. Seaward* 2 M. & W. 544 s.c. 150 Eng. Rep. 874.

³ (1900) 1 Ch. 843, *supra*; *Otto v. Linford* (1881) 46 L.T.N.S. 35; *Morgan v. Seaward* 2 M. & W. 544 s.c. 150 Eng. Rep. 874.

⁴ In the case of an invention communicated from abroad the true and first importer is in the same position as the true and first inventor; but it is essential that the communication of the invention to the importer was

as saying that the invention is not in use by any other person,¹ in other words he must establish the 'novelty' of the invention.² Here there is often a serious confusion caused by the word 'novelty' being used in different senses. Strictly speaking, any invention is a new invention, or else it is no invention. So far as this aspect of novelty is concerned, we have dealt with it in detail. Suppose an inventor by exercise of his own skill and ingenuity has really turned out something original. So far as he is aware, it is 'new.' But it so happens that it is already in use by some other person who comes forward and claims it as his own invention. Can the former get a patent for it? No. Subjectively, if I may be permitted to use the antithesis, it may be new, but objectively it is not. In fact it may be new, so far as he is concerned, but the law wants something more in order that it may be the subject-matter of a patent, namely, that it was not previously in use by any other person. When, therefore, the authorities lay down that the subject-matter of the patent must have novelty, one has to be prepared for the use of the word in either of the two significations above mentioned. Thus in *Patterson v. Gas Light Co.*³ it is held that the subject-matter should be novel. If the public once become possessed of an invention by any means whatsoever, no subsequent patent of it can be granted either to the first inventor or any person. The prior publication may have been made by the inventor himself; use by him or any other member of the public has the same effect in invalidating a patent. Thus if an article is manufactured openly that fact is sufficient to avoid a subsequent patent; it is not even necessary that a single piece should have been sold.⁴ But the

Prior use in public—its effect on patentability.

made outside the realm, in other words, the importation must strictly be from outside the realm. *Brown v. Annandale & Son* (1842) 1 Web. P.C. 433; *Roebuck v. Stirling & Son* (1774) 1 Web. P.C. 45; *Walton v. Bateman* (1842) 1 Web. P.C. 613. See also *Edgebury v. Stephens* (1668) 2 Salk 447, s.c. 91 Eng. Rep. 387; *Carpenter v. Smith* (1841) 1 Web. P.C. 540 s.c. 152 Eng. Rep. 127; *Nichols v. Ross* (1849) 8 C.B. 679 s.c. 137 Eng. Rep. 674; *Pimpton v. Malcolmson* (1876) 3 Ch. D. 531, which is referred to and discussed in *Sheen and another v. Johnson* I.L.R. 2. All. 368 at p. 377.

¹ *Norton v. W. H. Barker & Son* C.A. 30 R.P.C. 741; *Simplex Concrete Piles Ltd. v. J. W. Stewart* 30 R.P.C. 205.

² Vide section 38 of the Act.

³ 3 App. Cas. 239, 244.

⁴ *Mullins v. Hart* (1852) 3 Car & Kir 297; *Oxby v. Holden* (1860) 8. C.B.

What constitutes
public user.

use must be a public use, by which is meant not necessarily use by the public, but use in public. This has to be understood with reference to the doctrine already referred to, namely, that the Crown can grant patents only for the consideration that after the period of the patent expires, the invention will become the property of the public and thus conduce to the public weal. If, however, it is already public property the consideration does not exist and, therefore, the patent cannot be granted. Where, for instance, a lock had been used on a man's gate adjoining a public road, it was held that it was public use.¹ Where the article is openly exhibited in a shipbuilding yard and no precautions taken to secure secrecy,² it clearly amounts to public use within the meaning of the law. The circumstances of the case must be looked at in order to make out whether they can amount to public use or not. Where a few months before the date of a patent for an improvement in paddlewheels, two pairs of the wheels were made for the plaintiff (to whom the patent was afterwards assigned) by an engineer and his workman at his own manufactory, under the directions of the patentee, and under an injunction of secrecy, the engineer being paid for them by the plaintiff, and when finished they were taken to pieces, packed up, and shipped for a foreign port, where, according to the plaintiff's directions, they were put together and used (after the date of the patent) in steam boats belonging to a company, of which the plaintiff was the manager and principal shareholder, it was held that this was not such a publication of the invention as to avoid the patent.³ It follows that "if a person has invented anything which is the subject of a patent, and has kept it to himself or communicated it privately to one or two, in fact has not made it public knowledge, if any one else discovers that invention it is new, that

(N.S.) 666 s.c. 141 Eng. Rep. 1327; *Betts v. Neilson* (1868) 3 Ch. A. 429, 436.

¹ *Carpenter v. Smith* (1842) 9 M. & W. 300 at p. 304; 1 W.P.C. 540 s.c. 152 Eng. Rep. 127; *Stead v. Anderson* 2 W.P.C. 147, 148; *Taylor's Patent* 13 R.P.C. 482.

² *Life Boat Co. v. Chambers Brothers & Co.* 8 R.P.C. 418.

³ *Morgan v. Seward* 2 M. & W. 544; M. & H. 55; 6 L.J. Ex. 153; 1 Jur. 527 s.c. 150 Eng. Rep. 874.

is to say, new in the sense that the first invention has not been published.¹ A necessary and an unavoidable disclosure of an invention to others, if made in the course of mere experiments, is not such a publication as will avoid the subsequent grant of a patent, though the same disclosure, if made in the course of profitable use of an invention previously ascertained to be useful would be publication; but an experiment performed in the presence of others, which not only turns out to be successful, but actually beneficial in the particular instance, is not necessarily a publication, so as to constitute a gift of the invention to the world.² In the case of *Betts v. Menzies*³ an application for a patent was made in respect of improvement in making capsules. As there was some delay in the office, the applicant manufactured a quantity of the capsules between the date of application and that of the issue of the letters patent. They were made by his own workmen and were not intended for sale before the patent was granted, nor were they sold. It was held that this did not invalidate the patent.⁴ If the inventor of a machine lends it to another in order to have its qualities tested, and that person uses it for some weeks in a public work-room, this is not giving the invention such publicity as to deprive the inventor of his right to obtain letters patent for it.⁵ But the test of public knowledge such as would avoid a patent is rather a stringent one. It must be knowledge equal to that required to be given by a patent, that is, such knowledge as will enable the public to perceive the very discovery and to carry the invention into practical use. The publication, therefore, which would have the effect of invalidating a patent must be one from which a person with ordinary knowledge would be able practically to apply the discovery without further experiment.⁶

¹ Per Lord Bramwell in *Hills v. London Gas Light Co.* (1858) 5 H. & N. 336; see also *In re Dolland's case* (1766) 1 W.P.C. 43.

² *Newall v. Elliot* 4 C.B. (N.S.) 269; s.c. 140 Eng. Rep. 1087; 27 L.J. C.P. 337; 4 Jur. (N.S.) 562; *Elias v. Grovesend Tinplate Co.* (1890) 7 R.P.C. 455.

³ (1857.) 3 Jur. (N.S.) 885.

⁴ 22 L.J.Q.B. 361; 5 Jur. (N.S.) 1164.

⁵ *Bentley v. Fleming* 1 Car. K. 587.

⁶ *Hills v. Evans* 4 De. G.F. & J. 288; 31 L.J. Ch. 457; 8 Jur. (N.S.) 525 6 L.T. 90.

It is not enough that the invention has been published ; it must have been made public to such an extent that a knowledge of it may be assumed among persons in the trade or interested in the matter.¹ Public knowledge, however, irrespective of user seems to be enough. Thus in *Patterson v. Gas Light & Coke Co.*² it was held that if an invention without fraud becomes known to the public, no subsequent patent can be granted for it. It is not necessary that it should have been used by the public as well as known to the public. There are a few statutory exceptions to this rule as to prior use and publication. Section 40 deals with these exceptions.

Utility, Novelty
and Subject-matter
discussed.

Now that the terms invention, subject-matter, utility and novelty have been discussed it will be profitable to consider what part is played in the law of patents by each. As observed already they overlap each other at certain points ; none the less it is essential to assign their respective functions as far as possible. First of all, an invention must be an invention within the meaning of the Act, as above described.³ If it is, then and then alone is it a fit subject-matter for a patent. If it satisfies the requirements of an "invention" and thereby becomes a fit subject-matter, it implies that it has utility, for it will be remembered that utility in the common acceptance of the term is not what is meant by utility in the law of patents. In the ordinary sense of the term we may say "useful is that useful does." But when applied to the law of patents, usefulness or utility has a further signification, viz., that it must amount to an advance upon the then state of knowledge on the subject. Viewed in this light, the line of demarcation, if any, between a thing possessing utility and an invention, seems to be an illusory one. In other words, a patentable invention or an invention which is a fit "subject-matter" for patent must necessarily possess utility. Novelty, however, stands on a different footing. It will be remembered that novelty, in

¹ *Plimpton v. Spiller* 47 L.J. Ch. 211 ; 6 Ch.D. 412 ; 37 L.T. 56 ; 26 W.R. 285.

² 47 L.J. Ch. 402 ; (1877) 3 App. Cases 239 ; 38 L.T. 303 ; 26 W.R. 482 H.L.

³ See p. 111 *supra*.

the law of patents, has a technical signification. It means absence of prior user in public. The only case in India in which subject-matter and novelty have been discussed with reference to validity of patents is that of *Bhathey Sundararayan and others v. Laguduva Ramudu*.¹ In that case Wallis, C. J., observed: "It is quite clear from a perusal of the Patent Act of 1888, and the same conclusion follows from a perusal of the present Patent Act, the Indian Patents and Designs Act, II of 1911, that the framers of these Acts did not intend that there should be any separate defence to the grant of a patent on the ground of want of subject-matter as distinguished from want of novelty. . . . The Legislature, if I may say so, I think rightly took the view that any defence which had been raised under that head might appropriately be brought under the head of want of novelty. Consequently, we are of opinion that it is not open to the appellants in these cases to raise any defence of want of subject-matter as distinguished from want of novelty." With great respect it is submitted that this proceeds upon a misapprehension of the Indian Patents and Designs Act of 1911. The contents of the notion of subject-matter and those of novelty, according to the law of patents, are entirely different and, therefore, the defences on the two heads must also be separate. That the Law provides for such separate defence is clear from the terms of sections 26 and 29 of the Act. Section 26, clause (a), provides that want of utility is a sufficient ground for revocation of a patent. It will be observed that utility, within the meaning of the law, inevitably brings in what is technically called subject-matter. Moreover, section 26, clause (b), provides for another ground for such revocation, namely, that the invention in question was not a *new* 'invention,' within the meaning of the Act,² in other words, that it did not possess subject-matter. Thus subject-matter seems unmistakably to have been provided for in the Act as a ground for validity of patents, although the term 'subject-matter,' so common in English case-law on

¹ 27 Ind. Cas. 996 at p. 997.

² In this connection, see sections 2 (8) and 5 (e) of the Act.

the subject, has not been employed. Novelty has also been provided for in clause (b) of section 26, inasmuch as the invention to be patentable must be 'new.'¹

Essentials of
complete
specification.

The first essentials of complete specification are sufficiency, certainty and particularity. A specification must not omit these essential matters. The cases cover a wide variety, but they all establish the above few tests as the only legitimate ones. Thus it has been held that the test of a sufficient specification is whether it would enable an ordinary workman, exercising the actual knowledge common to the trade, to make the machine. It ought to tell the workman how to do it, but it need not tell him every detail.² The specification "ought to be framed so as not to call on a person to have recourse to more than those ordinary means of knowledge (not invention) which a workman of competent skill in his art and trade may be presumed to have. You may call upon him to exercise all the actual existing knowledge common to the trade, but you cannot call upon him to exercise anything more. You have no right to call upon him to tax his ingenuity or invention." In order to support a patent the specification should be so clear as to enable all the world to use the invention as soon as the term for which it has been granted is at an end.⁴ The specification of a patent is bad, if a skilled mechanic would not without performing a series of experiments be able to construct a machine from the description.⁵ If the specification does not mislead and contains enough to enable the workman to do that, then it is sufficient.⁶

¹ The above view is supported by a reference to the Statement of Objects and Reasons of Act II of 1911, paragraph 7 (e): "Defendants in infringement suits will be allowed in all cases to use the natural ground of defence by pleading non-validity and non novelty of the patent."

² *Plimpton v. Malcolmson*, 45 L. J. Ch. 505, 3 Ch. D. 531; 34 L. T. 340. "The fact that the workman may use a wrong tool when he has a right one, which a little thought will lead him to see ought to be used, does not warrant the inference that a specification is bad if it does not tell him which tool to use"—*Per Lindley L.J.* in *The Edison and Swan Light Co. v. Holland* (1889) 6 R. P. C. 243 at p. 282.

³ *Per Baron Alderson* in *Morgan v. Seaward*, 2 M. & W. 544 s.c. 150 Eng. Rep. 874, cited by Jessel M.R. in *Plimpton v. Malcolmson* (1876) L. R. 3 Ch. D. 531 at p. 569.

⁴ *Newbery v. James* 2 Mer. 446 at p. 451 s.c. 35 Eng. Rep. 1011.

⁵ *Wegman v. Corcoran*, (1879) 13 Ch. D. 65.

⁶ *Plimpton v. Malcolmson* L. R. 3 Ch. D. 531 at p. 570.

A patent is void if the specification is ambiguous or gives directions which tend to mislead.¹ If a specification contains an untrue statement in a material circumstance of such a nature that, if literally acted upon by a competent workman it would mislead him, and cause the experiment to fail, the specification is bad, and the patent invalidated, although a competent workman acquainted with the subject, would not be misled by the error, but would correct it in practice.² Where a specification claimed to effect a particular object by either of two alternative processes, one of which was found to be incapable of effecting the object and where evidence showed that no skilled practical workman would be misled, inasmuch as he would know that only one of the two processes would be effectual and the other one would have to be rejected, it was held notwithstanding that the specification was defective and the patent void.³ Not only must the specification be intelligible, but it must not attempt too much, i.e., it must not attempt to cover more than that which is the only proper subject for the protection of a patent. As Lord Eldon observes, "if a patentee seeks by his specification any more than he is strictly entitled to, his patent is thereby rendered ineffectual even to the extent to which he would be otherwise fairly entitled."⁴

Apart from the three requirements above mentioned, viz., sufficiency, certainty and particularity, the specification must satisfy another equally important test, and that is, good faith. The patentee must suppress or withhold nothing. It may be that he discloses enough in his specification to enable a workman skilled in his trade to make use of the invention according to the directions given, but he may withhold some item of information which gives him an advantage over others in using the invention. This will render the specification bad. Thus where a patentee

¹ *Turner v. Winter* 1 T.R. 602 s.c. 99 Eng. Rep. 1274. See also *Rex v. Arkwright*, Bull. N.P. 77: "If the specification be, in any part of it, materially false or defective, the patent is void."

² *Neilson v. Harford* 8 M. & W. 806; 11 L.J. Ex. 20; s.c. 151 Eng. Rep. 1266.

³ *Simpson v. Holliday* 35 L.J. Ch. 811; L.R. 1 H.L. 315.

⁴ *Hill v. Thompson and Foreman* 3 Mer. 622 at p. 629 s.c. 36 Eng. Rep. 239.

withheld the information that tallow could be advantageously used for making steel trusses, the subject-matter of the patent, and it was proved that he himself used tallow to facilitate his own work, it was held that the specification was bad for want of *bona fides*.¹ In *Wood v. Zimmer*,² it was similarly found that the patentee had withheld the information that by putting *aqua fortis* into the boiler the method of making verdigris, which was the subject-matter of the patent, was considerably facilitated, and that he himself used clandestinely to employ *aqua fortis* for the purpose, the specification was held to be bad. Where, however, there is no want of *bona fides*, the mere fact that the patentee has described four processes of dyeing and printing, of which only one is proved to have any practical value, does not vitiate the specification on the ground that he should have given specific directions how to produce the best shade of colour. As observed by Lord Halsbury "upon the principle contended for each shade must not only be shown but its excellence or popularity must be distinguished separately by the patentee. This, as it appears to me, reduces the obligation supposed to press upon the patentee to an absurdity."³ Nor will the specification be bad on the ground that the patentee has not disclosed the best method, if subsequent to the grant he discovers a better method, for the essence of the objection is want of *bona fides*.

Construction of specifications.

As to the construction of specification the rule is to construe the words according to their proper meaning, unless there is something in the context to show that a different construction ought to be made.⁴ This fact may be substantiated by evidence.⁵ Again,

¹ *Anonymous* W.P.C. 175n.

² W.P.C. 44, 82n ; Holt (N.P.) 58, s.c.17 R.R. 605. See also *The British Dynamite Co. v. Krebs* (1896) 13 R.P.C. 190; *Health v. Unwin* (1850) 2 W.P.C. 227.

³ *Badische Anilin and soda Fabrik v. Ivan Levinstein*, L.R. 12 A.C. 710 at p. 716.

⁴ Thus where the word 'malt' was used not in its usual sense, viz., that of an article used in the brewing, but only in the colouring of beer, and it was contended that the purpose need not be mentioned in the ground, it was held that if in any particular case the mention of the purpose be necessary to explain the words previously used, to shew that they were not used in their ordinary and obvious sense but in a sense limited and confined to that particular purpose, the purpose ought to be mentioned. *R.v. Wheeler*, 2 B. & A. 345 at p. 352 s.c. 106 Eng. Rep. 392.

⁵ *Elliott v. Turner* 2. C.B. 466; 15 L.J. C.P. 49. s.c. 135 Eng. Rep. 1019.

it has been held that the words used in a patent must be construed like the words of any other instrument, in their natural sense, according to the general purpose of the instrument in which they are found.¹

Under the statute the patentee has the exclusive privilege of making, selling and using the invention throughout British India and of authorising others to do so.² This privilege continues for a period of fourteen years from the date of the patent, unless the period is extended under special circumstances.³ If a patent is obtained fraudulently by a person who is not the true and first inventor but who puts himself forward as such, and it appears afterwards that the true and first inventor is another person, the patent is liable to be revoked and on the application of the true and first inventor (or his legal representative or assign) the Controller may grant to him a patent in lieu of and bearing the same date as the patent so revoked, for any invention comprised in the revoked patent to which he is entitled. Sec. 13, sub-sec. (2), which lays down this provision says, the revocation may be on the ground of fraud "or any other ground." This expression "or any other ground" is introduced to meet cases of hardship arising in circumstances akin to fraud, but not falling within the legal definition of fraud. Section 15 provides for the exceptional cases in which the term of patent may be extended. A patentee may, after advertising in the prescribed manner his intention to do so, present a petition to the Governor-General in Council praying that his patent may be extended for a further term, but such petition must be left at the office at least six months before the time limited for the expiration of the patent and must be accompanied by the prescribed fee. Where such a petition is presented the Governor-General in Council may, as he thinks fit, dispose of the petition himself or refer it to a High Court for decision. Any person may give notice to the Controller of his objection to the extension. If the petition be referred to a High Court, then on the hearing of such petition the patentee and any person

Term of Patent.

¹ *Clark v. Adie* 46 L.J. Ch. 598; 2 A.C. 423; 37 L.T. 125; W.R. 45.

² Sec. 14.

³ Sec. 15.

who has given notice shall be made parties to the proceeding and the Controller shall be entitled to appear and be heard. The Court in considering its decision must have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case. If it appears to the Governor-General in Council or to the High Court that the patent has been inadequately remunerated by his patent, the Governor-General in Council or the High Court, as the case may be, may by order extend the term of the patent for a further term not exceeding seven, or in exceptional cases fourteen, years, or may order the grant of a new patent. To entitle a patentee, or his assignee, to an extension of the term of letters patent he must establish three things; first, the merit of his invention; secondly, that the parties interested had done all in their power to bring the invention into public use and to turn it to advantage; and, thirdly, that from circumstances beyond their control they had been unable to obtain adequate remuneration.¹ The merit and utility of the invention, the merit of the petitioner in patronising an ingenious inventor, and liberally expending money to introduce the invention, the amount of profit not being greater than the ordinary profit on capital employed in similar trades, the annoyances, anxiety and cost of litigation are several grounds for consideration in recommending an extension.² But it is in every case essential for the petitioner to establish that the invention is of considerable merit and of public utility, and that it has brought an inadequate remuneration.³ The non-reduction of the patent into practical public utility is the strongest evidence against merit and utility.⁴ Indeed, the fact of an invention, not getting into general use, is a presumption against its utility. So an extension of the term of patent must be refused although the profits derived from the patented article are less than the

Extension of the term of letters patent.

Grounds on which extension may be granted.

¹ *In re Markwick's Patent* 13 Moore P.C. 310; 8 W.R. 333; *In re Poulsen's Patent* 30 R.P.C. 597.

² *In re Whitehouse's Patent* 2 Moore P.C. 496.

³ *In re McDougall's Patent* 37 L.J. P.C. 17; L.R. 2 P.C. 1, 5 Moore P.C. (N.S.) 1; *In re Ritchie's Patent* 31 R.P.C. 1.

⁴ *In re Pinkus' Patent* 12 Jur. 233.

expenditure incurred upon the patent, the utility of the invention being small.¹ To re-state the grounds on which extension of patents are granted, they are, first, to reward the inventor for the peculiar ability and industry he has exercised in making the discovery; secondly, to reward him, because some great benefit of an unusual description has been conferred by him upon the public through the invention itself; or, thirdly, because the inventor has not been sufficiently remunerated by the profit derived from his strenuous exertions to make the invention profitable. All these grounds proceed on the supposition that the invention is a new and useful invention. But where an inventor intentionally delays for a great length of time attempting to put the invention into practice, those reasons for a prolongation of the patent cannot be relied upon by him, unless he shows some reasonable ground, such as want of funds, for the delay.² A patentee seeking the grace and favour of the Crown, in applying for an extension of the term of letters patent, is bound to bring his accounts before the court in such a shape as to leave no doubt what the remuneration has been that he has received from the patent.³ The account of profit and loss of the patentee in working a patent ought to be clear and precise; and it is the duty of the patentee, if engaged in any other business, or as a manufacturer of his own invention, to keep the account of the patent and the manufacture separately.⁴ The most unreserved and clear statement of the patentee's remuneration is an indispensable condition for extension.⁵ To entitle a patentee to a prolongation of the term of letters patent he must satisfactorily establish the amount of his profit.⁶ He must show in a manner which admits of no controversy, what has been the amount of remuneration which, in every point of view, the invention has brought him and it

¹ *In re Simister's Patent* 4 Moore P.C. 164, 7 Jur. 451.

² *In re Norton's Patent* 1 Moore P.C. (N.S.) 339, 9 Jur. (N.S.) 419, 11 W.R. 720.

³ *In re Clark's Patent* 7 Moore P.C. (N.S.) 255; L.R. 3 P.C. 421.

⁴ *In re Bett's Patent* 1 N.R. 137; 1 Moore P.C. (N.S.) 49; 9 Jur. N.S. 137; 7 L.T. 577; 11 W.R. 221.

⁵ *In re Hull's Patent* 1 Moore P.C. (N.S.) 258; 9 Jur. (N.S.) 1209; 9 L.T. 101; 12 W.R. 25.

⁶ *In re Trotman's Patent* L.R. 1 P.C. 118.

is his duty to frame the accounts in such a shape as to leave no doubt as to what remuneration he has received.¹ The authorities on this head are numerous and they all go to establish that whether the patentee's remuneration has been adequate or not his furnishing a satisfactory account is a condition precedent to his obtaining an extension of his term.² In estimating the profits derived from the patent, a deduction is allowed for the personal expense of the patentee, who is entitled to charge, as part of his expenses, for loss of time in endeavouring to bring the invention into general use.³

RIGHTS AND REMEDIES.

Rights and remedies from the point of view of the public.

We now come to the subject of enforcement of the rights and remedies in regard to patents. This subject may be conveniently discussed from two points of view—from the point of view of the public, and from the point of view of the individual. The proceedings that may be regarded as specially meant for safeguarding the interests of the public are indicated in sections 22, 23, and 25 of the Act. Sec. 22 provides that any person interested may present a petition to the Governor-General in Council, which shall be left at the Patent Office, alleging that the reasonable requirements of the public with respect to a patented invention have not been satisfied and praying for the grant of a compulsory license, or in the alternative, for the revocation of the patent. If it be found that the reasonable requirements of the public with reference to the patented invention have not been satisfied, the patentee may be ordered to grant licenses on such terms as the Governor-General in Council, or the High Court, as the case may be;⁴ may think just, or if the Governor-General in Council or the High Court is of opinion that the reasonable requirements of the public will not be satisfied by the grant of licenses,

¹ *In re Saxby's Patent* 7 Moore P.C. (N.S.) 82; L.R. 3 P.C. 292; 19 W.R. 513.

² *In re Adair's Patent* 6 A.C. 176; 29 W.R. 746.

³ *In re Carr's Patent* 9 Moore P.C. (N.S.) 379; L.R. 4 P.C. 539. *In re Newton's Patent* 14 Moore P.C. 156; 10 W.R. 731.

⁴ The Governor-General in Council may, as he thinks fit, either dispose of the petition himself, or refer it to a High Court for decision.

the patent may be revoked by order of the Governor-General in Council or the High Court. 'Reasonable requirements' is also defined by the Act. If by reason of the default of the patentee to manufacture to an adequate extent and supply on reasonable terms the patented article, or any parts thereof, which are necessary for its efficient working, or to carry on the patented process to an adequate extent, or to grant licenses on reasonable terms, any existing trade or industry, or the establishment of any new trade or industry in British India is unfairly prejudiced, or the demand for the patented article or the article produced by the patented process is not reasonably met, the reasonable requirements of the public shall be deemed not to have been satisfied. So again, if any trade or industry in British India is unfairly prejudiced by the condition attached by the patentee before or after the commencement of the Act to the purchase, hire or use of the patented article, or to the using or working of the patented process, it shall amount to not satisfying the reasonable requirements of the public.¹ Sec. 23 deals with revocation of a patent on the ground that the patented article or process is manufactured or carried on exclusively or mainly outside British India. Any person may apply for such revocation not less than four years after the date of a patent. The Governor-General in Council shall consider the application and if, after inquiry, he is satisfied that the allegations are correct, that the applicant is prepared, and is in a position to manufacture or carry on the patented article or process in British India and that the patentee refuses to grant a license on reasonable terms, he may make an order revoking the patent unless the patentee proves

¹ Mere default in supplying the patented article or granting a license to an individual does not necessarily amount to 'default in supplying the patented article or granting licenses' within the meaning of sub-section (5) (a) of the section. The expression "trade or industry" in sub-section (5) (a) is to be read in a wide sense, as one speaks of the cotton or woollen trade or industry, so that it is not enough to establish that a particular trade is unfairly prejudiced; it must be further proved that the trade or industry as a whole is thus affected. The 'establishment of any new trade or industry' referred to in sub-section 5 (a) is a different thing from the entry of particular person into an existing trade or industry. The 'demand' referred to in sub-section 5 (a) is not the demand of a particular person, but that of the public at large. *In re Robin Electric Lamp Company's Petition* (1915) 1 Ch.D. 780; 32 R.P.C. 202; 113 L.T. 132

that the patented article or process is manufactured or carried on to an adequate extent in British India, or gives satisfactory reasons why the article or process is not so manufactured or carried on. A patent may also be revoked if the patent, or the mode in which it is exercised, be mischievous to the state or generally prejudicial to the public (sec. 25).

Rights and remedies from the point of view of the individual.

Forms of proceedings prescribed.

Apart from these special cases of revocation of patent there may be revocation of a patent, in whole or in part, by legal proceedings and such legal proceedings may be initiated by petition to a High Court (sec. 26). The petition may be presented by the Advocate-General or any person alleging that the patent was obtained in fraud of his rights, or of the rights of any person under or through whom he claims, or that he, or any person under or through whom he claims, was the true and first inventor of any invention included in the claim of the patentee; or that he or any person under or through whom he claims an interest in any trade, business or manufacture, had publicly manufactured, used or sold, within British India, before the date of the patent, any thing claimed by the patentee as his invention. An application for revocation will lie on any of the grounds which go to the validity of a patent such as, that it has no utility; that it was not a new invention at the date of the application; that the patentee was not the true and first inventor; that the specification, original or amended, does not fulfil the requirements of the act; that the patentee had fraudulently put forward as his invention something which was not new and whereof he was neither the inventor, nor the assign nor the legal representative of such inventor; that his application or specification contains a wilful or fraudulent mis-statement, or that there was insufficiency of description and that such insufficiency was fraudulent or injurious to the public.

The public are also protected from groundless threats of institution of legal proceedings at the instance of patentees by section 36. This section lays down in effect that any person who is aggrieved by such threats may institute a suit in a District Court and obtain (1) an injunction and (2) damages if he has sustained any. But there is a proviso to this

section which says that "this section shall not apply if the person making such threats with due diligence commences and prosecutes a suit for infringement of his patent." The object of this section is to prevent a patentee from causing damage to a rival by "disseminating threats which he dare not or will not justify by an action, who is willing to wound but yet afraid to strike."¹ A general warning to the public to the effect that "A. B. has a patent for such and such a machine and proceedings will be taken against any one who infringes it" will not be actionable. It is only when the warning either expressly or by implication points to any particular individual that it becomes actionable as a threat.²

Then there is the usual remedy available to the patentee by a suit for infringement of patent against any person who during the continuance of a patent makes, sells or uses the invention without license, or counterfeits it or imitates it.³ To a suit for infringement the defence set up may be on any of the grounds already indicated on which a patent may be revoked. It has been held that to manufacture abroad according to a process patented in England and then import the substance for sale in England is a violation of the patent⁴; also importing of such an article though not for sale, yet for the purpose of experiment or instruction is a user for advantage and an infringement.⁵ Any one who uses what is an infringement of a patent is liable though he was only an agent or servant of another who is not himself sued. Thus the captain of a vessel fitted with pumps

Suit for infringement of patent.

¹ *Per North, J.*, in *Day v. Foster* (1890) 7 R.P.C. 60; see also *Lindley L.J.* in *Skinner v. Perry* (1893) 1 Ch.D. 420.

² *Challender v. Royle* (1897) 14 R. 36 Ch.D. 441; s.c. 4 R.P.C. 375.

³ Section 29. The words "District Court" includes the High Court in the exercise of its ordinary original civil jurisdiction. *Kedarnath Mandal v. Gonesh Chandra Adah* (1907) 12 C.W.N. 446. See also sec. 2 (b) of the Act and sec. 2 (4) of the Code of Civil Procedure (Act V of 1908).

A patent privilege may be infringed in several ways: (1) by making or manufacturing articles for use or sale by means of the art which has been invented by the patentee, or by using, exercising or putting the art into practice, to the prejudice of the patentee in any other way; (2) by vending or selling articles made in violation of the patent privilege; (3) by making for use or sale, or vending articles which counterfeit, imitate or resemble articles made in pursuance of the invention: (4) by counterfeiting or imitating the invention in any other way. — *Hindmarsh's 'Law of Patents.'*

⁴ *Von Heyden v. Neustadt*, 14 Ch.D. 230.

⁵ *United Telephone Co. v. Sharples* 29 Ch.D. 164.

which were an infringement of the plaintiff's patent was held liable although he was not owner of the vessel.¹ The burden of showing that the plaintiff has a cause of action, lies upon him in a patent case just as much as in any other case.² When, however, the grant of patent is once proved, the onus of proving that it had determined is on the defendant. Where a patent is for an invention consisting of several parts, the imitation of any part of the invention is an infringement of the patent.³ In determining whether a defendant has infringed the plaintiff's patent, the Court will regard the substance of the invention, and if the defendant has infringed the substance of the invention, although he may have made immaterial variations or used mechanical equivalents, an injunction will be granted.⁴ The manufacture and sale of an article made out of a material, the making of which infringes a patent, is also an infringement of the patent and must be restrained by an injunction. However much the article may completely change the nature of the material, the material itself is obtained by infringing the patent and the plaintiffs are indirectly deprived of the benefit of their invention by the use made of it by the defendants.⁵ Where a patent is obtained for the use of particular chemical materials for arriving at a particular chemical result, it is no infringement to arrive at the same result by the use of other chemical materials which were not known to be equivalents for the materials mentioned in the specification at the time when the patent was obtained.⁶ When articles which were the subject of a patent are made without a license from the patentee simply for the purpose of *bona fide* experiments, those who so make them are not necessarily liable to an action but when they are made and used for profit, or with the object of obtaining profit even to a lim-

¹ *Adair v. Young* 12 Ch. D. 13.

² *Saccharine Corporation Ltd. v. Wild* (1903) 1. Ch. 410.

³ *Smith v. L. & N.W. Ry.* 2 El. & Bl. 69; 17 Jur. 1071; S.C. 118 Eng Rep. 694. *The United Horsenail Co. v. Stewart* (1886) 3 R.P.C. at p. 143. Cf. *United Telephone Co. v. Walker* (1887) 4 R.P.C. 63; 56 L.T. 508.

⁴ *Thorn v. Worthing Skating Rink Co.* 6 Ch.D. 415n.

⁵ *Saccharine Corporation Ltd. v. Anglo-Continental Chemical Works* (1901) 1 Ch.D. 414.

⁶ *Badische Anilin und Soda Fabrik v. Levinstein* 52 L.J.Ch. 704; 24 Ch.D. 156; 48 L.T. 820; 31 W.R. 913; affirmed 12 A.C. 710 H.L.

ited extent, such making and using constitute an infringement of the patentee's rights.¹

Section 30 of the Act makes provision for the protection of innocent infringers. It lays down that 'a patentee shall not be entitled to recover any damages in respect of any infringement of a patent granted after the commencement of this Act from any defendant who proves that at the date of that infringement he was not aware, nor had reasonable means of making himself aware, of the existence of the patent, and the making of an article with the word "patent," "patented" or any word or words expressing or implying that a patent has been obtained for the article, stamped, engraved, impressed on, or otherwise applied to the article, shall not be deemed to constitute notice of the existence of the patent unless the word or words are accompanied by the year and number of the patent: Provided that nothing in this section shall affect any proceedings for an injunction.' This section applies only to patents granted after the 1st January, 1912. Prior to this Act, the law was that ignorance of the existence of a patent was no excuse for infringement and the infringer was liable to an injunction as well as to pay damages.

The reliefs which are open to the plaintiffs are of two kinds: 1. Injunction, 2. Damages or an account of profits. As observed by Romer, J., in *Shoe Machinery Co. v. Cutlan*.² "Two kinds of action may be brought by a plaintiff patentee. The one is based on this—that the defendant has infringed before action brought, and in respect of this the plaintiff is entitled to claim damages, or an account, or an injunction to prevent similar infringements in the future. The other action is based on the fact, not that the defendant has infringed, but that he threatens and intends to infringe; and in this case the plaintiff may claim an injunction to restrain the threatened infringement. Of course you may find both kinds of action combined in one."

When the validity of the patent and the fact of the infringement are established, and when there is

¹ *Frearson v. Loë* 9 Ch D. 48; 27 W.R. 183.

² 12 R.P.C. at p. 367; (1896) 1 Ch.D. 108.

a probability of the infringement being repeated a perpetual injunction restraining the infringement of the patent will be granted.¹ Where a patent is infringed and the patentee has *prima facie* case, an injunction will be granted, for it is presumed that an infringer intends to go on infringing, notwithstanding any promise he may make not to do the same thing again² unless there are special circumstances which show that there is no probability of the infringement being repeated; e.g., injunction was refused where the defendant who was the captain of a ship having the infringing machinery had resigned his post.³ Even when there has been no actual infringement but an intention to infringe is shown, an injunction will be granted.⁴ A patentee can sustain an injunction to restrain a threatened infringement of patent, even if no actual infringement has taken place.⁵

Possession of
infringing article.

An interesting question often presents itself and that is, 'Is the mere possession of an infringing article a sufficient ground for granting an injunction?' It has been urged in several cases that mere possession is not enough, unless intention to use the article is proved.⁶ But it was held that an injunction must be granted for "if it is not their intention to use the instrument, then the injunction asked for can do them no harm." In *Adair v. Young*⁷ an action was brought against the master of a ship to restrain him from using pumps which were an infringement of the plain-

¹ *Bridson v. M'Alpine* (1845) 8 Beav. 229 s.c. 50 Eng. Rep. 90; *Proctor v. Bayley* (1889) 42 Ch.D. 390 C.A. See also *Lyon v. Newcastle-upon-Tyne Corporation* (1894) 11 R.P.C. 218.

Evidence of act after the initiation of the proceedings has been held to be inadmissible for the purpose of showing that the defendant intends to commit infringement in the future. *The Welshbach Incandescent Gas Light Co. v. Dowle* (1899) 16 R.P.C. 391. But see *The Shoe Machinery Co. v. Cuilan* (1895) 12 R.P.C. at p. 367, where Romer, J., was of opinion that "leave would be given by the Court to the plaintiff in a proper case, and on proper terms to amend his action, and to bring these subsequent infringements before the Court to be dealt with once and for all with the prior infringement."

² *Losh v. Hague* 1 W.P.C. at p. 200.

³ *Caldwell v. Van Vlietingen* (1851) 21 L.J. (Ch.) 97; 68 Eng. Rep. 571.

⁴ *Proctor v. Bayley* (1889) 42 Ch.D. 390, *per* Cotton L.J. at p. 398. See also *Dunlop Pneumatic Tyre Co. v. Neal* (1899) 1 Ch.D. 807.

⁵ *Frearson v. Loe* 9 Ch.D. 48; 27 W.R. 183. See also *Dowling v. Billington* (1890) 7 R.P.C. 191.

⁶ *United Telephone Co. v. London and Globe Telephone and Maintenance Co.* (1884) 26 Ch.D. 766 at p. 775. See, however, *Messers Moody, Wraith and Gurr, Ld. v. Newell and Co.* 31 R.P.C. 510.

⁷ (1879) 12 Ch. D. p. 13.

tiff's letters patent. It was shown that the ship was fitted up exclusively with pumps which were an infringement of the letters patent, but was so fitted up before the defendant had taken command of her and he had nothing to do with putting them on board, and they had never been worked in British waters. It was held by Brett and Cotton, L.J.J. (James, L.J. dissenting), that injunction was rightly granted on the ground that if any accident had happened to the ship the pumps which were ready for use would have been actually used within British waters and the master, therefore, must be considered to have intended to use them.¹

The Court will generally refuse to interfere by injunction if the infringer has acted innocently and promptly discontinues and offers a proper undertaking and compensation²—but the undertaking must be full and clear.³ Nor will the court grant an injunction if it be suspected that the plaintiff's object is to advertise the patent and the defendant does not oppose.⁴ Nor will an injunction be granted if the infringement has ceased to continue: "It is not because a man has done a wrong that an injunction will be granted against him."⁵ Acquiescence is another ground on which the Court will refuse to grant an injunction, but such acquiescence must amount to a representation to the defendant that what he is doing is not an infringement; mere silence or lying-by on the part of the plaintiff will not be sufficient.⁶

Where the patent is an old one, and there has been long and undisturbed enjoyment of it, or where its validity has been established elsewhere and the Court sees no reason to doubt the result, or where the conduct of the defendant has been such that as against him there is no reason to doubt the validity of the patent, the Court will, in support of the patent

Interlocutory
injunction.

¹ (1879) 12 Ch.D. p. 13 at p. 19. See *British Motor Syndicate v. Taylor* (1900) 17 R.P.C. 189, 723. *Dowling v. Billington* (1890) 7 R.P.C. 191, at p. 201. *Dunlop v. British Car Co.* (1901) 18 R.P.C. 313. *Proctor v. Bailey* (1889) 6 R.P.C. 112, 538; 42 Ch.D. 390.

² *Jenkins v. Hope* 13 R.P.C. 57. *Betts v. Wilmot* (1870) 18 W.R. 946.

³ *United Telephone Co. v. London & Globe Co.* 1 R.P.C. 118.

⁴ *Dover v. New Townsend Co.* 21 R.P.C. 135. *Badische Anilin und Soda*

Fabrik v. Spivey (1905) 22 R.P.C. 65.

⁵ *Proctor v. Bailey* (1889) 6 R.P.C. 538; 42 Ch.D. 390.

⁶ *Proctor v. Bennis* (1887) 36 Ch.D. 740 at pp. 759, 761.

right, interfere by interlocutory injunction.¹ In a suit to restrain the infringement of a patent relating to roller skates the plaintiff moved for an injunction against the defendant until the hearing. It was held that the plaintiff was entitled to an injunction upon giving an undertaking as to damages.² Whether the Court will grant an *interim* injunction or not depends upon the degree of doubt which exists as to the question of validity and infringement. The degree of convenience and inconvenience caused by granting an injunction will always be carefully considered.³ For example, in one case,⁴ an injunction though granted, was suspended for six months, as great inconvenience would have been caused to the public if the use of the infringed machinery were suddenly stopped; and in another⁵ it was suspended pending appeal, inasmuch as enforcing it at once would throw a large number of workmen out of employment. The general principle, however, followed in the matter of *interim* injunctions is that the court will interfere to protect a patentee before he has established his rights at law in the case of patents which have been long used and enjoyed, but in the case of new patents will suspend its interference until the right at law has been established.⁶ There are, of course, exceptions. Although the ordinary rule is not to grant an injunction unless either the validity of a patent has been established or the patent has been undisputed for many years, the circumstances of the case may be such as to induce the court to depart from the rule.⁷ An injunction cannot be granted in respect of a pa-

¹ *Dudgeon v. Thomson* 30 L.T. 244; 22 W.R. 464; 3 A.C. 34. See also *Hindmarsh's Law of Patents*: "When a patentee can show that he has possession of a patent privilege, under colour of a title not only evidenced by his patent but also supported by long and undisputed enjoyment, and can also show that the defendant against whom he is proceeding has violated the privilege, he shall have immediate relief and the protection of an interlocutory injunction."

² *Plimpton v. Spiller* 4 Ch.D. 286; 35 L.T. 656; 25 W.R. 152.

³ *Bridson v. McAlpine* 8. Beav. 229 S.C. 50 Eng. Rep. 90.

⁴ *Hopkinson v. St. James and Pall Mall Electric Light Co.* (1893) 10 R.P.C. at p. 62.

⁵ *The Leeds Forge Co. v. Deighton's Patent Flue Co.* (1901) 18 R.P.C. at p. 240.

⁶ *Caldwell v. Vanvlissengan*, 9 Hare 415 68; 21 L.J.Ch. 97; 16 Jur. 115; S.C. Eng. Rep. 571. *Curtis v. Cutts* 18 L.J.Ch. 184. *Hill v. Thomson* 3 Mer. 622; 17 R.R. 156; S.C. 36 Eng. Rep. 239. *Davenport v. Richard* 3 L.T. 503.

⁷ *Renard v. Levinstein* 10 L.T. 94, affirmed 10 L.T. 177.

tent which has expired.¹ So also when an action is brought immediately before the expiration of a patent, an injunction will, as a general rule, be refused,² but the sale of articles manufactured in infringement during the life of the patent would be restrained even after its expiration.'

When there are several infringers, the plaintiff should "select that which he thought the best in order to try the question fairly and proceed in that case to obtain his interlocutory injunction. He might write at the same time to all the others who were *in simili casu*, and say to them, 'Are you willing to take this as a notice to you that the present case is to determine yours? Otherwise I shall proceed against you by way of interlocutory injunction; and if you will object on the ground of delay, I do not mean to file bills against all of you at once. Am I to understand that you make no objection of that kind? If you do not object I shall file a bill against only one of you.' I do not think any court could complain of a patentee for taking the course I am suggesting."⁴ Several infringers.

Another remedy to which the patentee is entitled is damages or an account of profits. But he is not entitled to both; he must elect which of the two he will take.⁵ When damages are claimed, he is entitled to such damages as will fairly compensate him for the injury which he has sustained by reason of the wrongful act of the defendant proved at the trial. The act of the defendant is treated as a tort and the measure of damages is not the profit made by the infringer but the loss sustained by the plaintiff.⁶ Damages.

¹ *Saccharine Corporation, Ltd. v. Quincey* (1900) 2 Ch.D. 246 at p. 249.

² *Betts v. Gallais* (1870) L.R. 10 Eq. 392. *Welsbach Incandescent Gas Light Co., Ltd. v. New Incandescent (Sunlight Patent) Gas Lighting Co.* (1900) 17 R.P.C. 237, 254.

³ *Crossley v. Beverley* (1820) 1 Russ & M. 169 S.C. 39 Eng. Rep. 65. *Crossley v. Derby Gas Light Co.* (1834) 44 L.J. Ch. 25. *Price's Patent Candle Co. v. Bauwen's Patent Candle Co.* (1858) 4 K. & J. 727 S.C. 70 Eng. Rep. 302.

⁴ *Per* Sir W. Pagewood V.C. in *Bovill v. Orate* (1865) 1 Eq. at p. 391.

⁵ *Neilson v. Betts* (1871) L.R. 5, H.L. at p. 22. *De Vitre v. Betts* (1873) L.R. 6 H.L. 319. *United Horsenail Co. v. Stewart* (1886) 3 R.P.C. at p. 143 S.C. 5 R.P.C. at p. 266; S.C. 7 R.P.C. 152. *Kinmond v. Jackson* (1877) 1 C.L.R. 66.

⁶ *United Horseshoe & Nail Co. v. John Stewart & Co.* (1886) 3 R.P.C. 143; S.C. 5 R.P.C. 260 S.C. 13 A.C. 401; *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.* (1901) 1 Ch.D. 196.

As Lord Watson observed: "The profit made by the infringer is a matter of no consequence. However large his gains, he is only liable in nominal damages so long as his illegal sales do not injure the trade of the patentee; and however great his loss, he cannot escape from liability to make full compensation for the injury which his competition may have occasioned."¹ It is necessary for the plaintiff to give such evidence as will enable the court to estimate the extent of the loss and injury which he has sustained; in the absence of such evidence he cannot get more than nominal damages.² "The loss," in the words of Lord Macnaughten, "must be the natural and direct consequence of the respondents' acts"³; so the damages generally will be the loss of profit suffered by the plaintiff on account of the sale by the defendant of the pirated articles. But the plaintiff can claim more by showing that the defendant's unlawful competition has caused him to lower prices,⁴ or has otherwise caused him loss, e.g. if the plaintiff had received the orders which the defendant had received, the establishment charges on the articles manufactured would have been proportionately reduced and the profit would have been greater.⁵ But where damages are sought to be recovered on the ground of lowering of prices, it must be clearly shown that the reduction was due to the defendant's unlawful competition and not to the ordinary exigencies of trade.⁶ Where a patentee has been in the habit of granting licenses at a certain royalty, the measure of damages will be the amount of royalty which the plaintiff would have received.⁷

¹ *The United Horseshoe & Nail Co. v. John Stewart & Co.* 5 R.P.C. at p. 267; 13 A.C. at p. 413.

² *Minter v. Mover* 1 Webs R. 138.

³ *United Horseshoe & Nail Co. v. John Stewart & Co.* (1886) 5 R.P.C. at p. 268; 13 A.C. at p. 416.

⁴ *Meters Ltd v. Metropolitan Gas Co.* 28 R.P.C. 157 C.A.; 144 L.T. 113. *United Horseshoe & Nail Co. v. John Stewart & Co.* 5 R.P.C. 260; 13 A.C. 401. *American Braided Wire Co. v. Thomson* 7 R.P.C. 152; 44 Ch.D. 274.

⁵ *Leeds Forge Co., Ltd. v. Deighton's Patent Flue Co.* (1908) 25 R.P.C. 209.

⁶ *Alexander v. Henry* (1895) 12 R.P.C. at p. 367. See also 13 A.C. at p. 216.

⁷ *Penn v. Pack* (1867) L.R. 5. Eq. 81. *English and American Machinery Co. v. Union Boot and Shoe Machine Co.* (1896) 13 R.P.C. 64. *The Pneumatic Tyre Co., Ltd. v. Puncture Proof Pneumatic Tyre Co., Ltd.* (1899) 16 R.P.C. 209. *The British Motor Syndicate v. John Taylor and Sons, Ltd.* (1900) 17 R.P.C. 723. *Sheen and another v. Johnson* (1879) I.L.R. 2 All. 368.

When judgment for a perpetual injunction has been granted and an enquiry as to damages ordered, the defendant must make full discovery of the names and addresses of the persons to whom the infringing articles have been sold.¹

In the case of an account of profits, the point of view taken is different from that adopted in the case of damages. The test is not the loss to the plaintiff but the profit made by the infringer who, for the purpose of accounting, is treated as the agent of the plaintiff.² Of the two remedies, an account of profits would obviously be preferable in certain cases, for instance where the defendant has an established trade on a profitable footing and the plaintiff is not trading. But an enquiry as to profits has also its own disadvantages, involving, as it often does, questions of great difficulty as well as considerable expenditure of time and money. "Therefore, although the law is that a patentee has a right to elect which course he will take, as a matter of business he would generally be inclined to take an inquiry as to damages rather than launch upon an inquiry as to profits."³ In certain cases, an inquiry as to damages is the only relief open to the plaintiff, for instance, where it appears at the trial, that the defendant has made no profit, in which case an account of profits will not be allowed.⁴ Where the plaintiff has tacitly acquiesced in the infringement, looking for an account of profits in future, the court on principles of equity will not grant him the relief. As Lord Brougham observed:⁵ "It is a principle of equity, that a party who claims a right should not lie by, and by his silence or acquiescence induce another to go on spending his money and incurring risk, and afterwards, if profit has been made, come and claim a share in that profit without having ever been exposed to share in the losses which might have been sustained."

¹ *Murray v. Clayton* (1872) L.R. 15 Eq. 115. *American Braided Wire Co. v. Thomson* (1885) 5 R.P.C. 375. *Saccharine Corporation v. Chemicals Co* (1900) 17 R.P.C. 612; (1900) 2 Ch.D. 556.

² *Betts v. Neilson* (1866) L.R. 5 H.L. 1. *Betts v. DeVitre* (1864) L.R. 6 H.L. 319. *Watson v. Holliday* (1882) 20 Ch.D. 782 C.A.

³ *Per Lindley, L.J.* in *Siddell v. Vicker* 9 R.P.C. at p. 163.

⁴ *Bacon v. Spottiswoode* (1839) 1 Beav. 387 S.C. 48 Eng. Rep. 988.

⁵ *Crossley v. Derby Gas Light Co.* 1 W.P.C. at p. 120.

Delivery up.

In addition to the remedies above mentioned, there is another remedy recognised by the Courts in England in a series of cases, and that is by a mandatory order upon the defendant to deliver up to the plaintiff the infringing articles or to destroy them. Section 31 of Act II of 1911 vests in the Courts in this country a very wide discretion which may be regarded as ample for the purpose of such an order in a fit case. Such an order, however, will only be made when the nature of the infringing matter will permit of it.¹ If the circumstances of the case are such that such an order would do mere mischief, the order would not be made.² The order for delivery up shall be restricted, where possible, to the infringing parts only.³ Where the patent is not for the constituent parts of a combination, but for their use in that particular combination, the defendant may be allowed to keep the parts though ordered to remove them from the patented combination.⁴ It is to be noted however that the property in the infringing articles remains in the infringer, although the patentee is entitled to prevent the use of these articles in derogation of his rights and also to an order, if, necessary, for a destruction of the articles so as to prevent them from being so used.⁵

Certificate
of validity.

A special provision laid down for the protection of patentees under section 32 of the Act calls for a few words. The section runs as follows: "In a suit for infringement of a patent, the court may certify

¹ *Frearson v. Loe* (1878) L.R. 9 Ch.D. 48 at p. 67. *British Vacuum Cleaner Co., Ltd. v. James Robertshaw and Sons, Ltd.* C.A. 31 R.P.C. 29. *Osrarn Lamp Works, Ltd. v. Schloss & Co.* 30 R.P.C. 359.

² *United Telephone Co. v. London and Globe Telephone and Maintenance Co.* (1884) 26 Ch.D. 766 at p. 776.

³ *Edison Bell v. Smith* 11 R.P.C. 389 C.A. *British Vacuum Cleaner Co. v. Sections Ltd.* 21 R.P.C. 303. *Automatic Weighing Machine Co. v. Fearby* 10 R.P.C. 442; *House v. Weber* 12 R.P.C. 478.

⁴ *Morgan v. Windover* 7 R.P.C. 446.

⁵ "The property in articles which are made in violation of a patent is, notwithstanding the privilege of the patentee, in the infringer, if he would otherwise have the property in them. The Court in a suit to restrain the infringement of a patent does not proceed on the footing that the defendant proved to have infringed has no property in the articles; but, assuming the property to be in him, it prevents the use of those articles, either by removing that which constitutes the infringement, or by ordering, if necessary, a destruction of the articles so as to prevent them from being used in derogation of the plaintiff's rights, and does this as the most effectual mode of protecting the plaintiff's rights—not on the footing that there is no property in the defendant." *Per Cotton, L.J., in Vavasour v. Krupp.* (1878) 9 Ch.D. 351 at p. 360.

that the validity of the patent came in question, and, if the court so certifies, then in any subsequent suit in that court for infringement of the same patent, the plaintiff, on obtaining a final order or judgment in his favour, shall, unless the court trying the suit otherwise directs, have his full costs, charges and expenses of and incidental to the said suit properly incurred." The object of the section is apparently to protect the patentee from being exposed to the risk of bringing successive suits for restraining infringements, where manufacturers may conspire together to defeat his rights by such ruinous litigation. It is in fact a sort of penal provision for deterring intending infringers.

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APPENDIX.

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THE SCHEDULE.—FEES.

ACT No. II OF 1911.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

*(Received the assent of the Governor General on the 1st
March 1911.)*

An Act to amend the law relating to the protection of Inventions and Designs.

WHEREAS it is expedient to amend the law relating to the protection of inventions and designs ; It is hereby enacted as follows :—

PRELIMINARY.

1. (1) This Act may be called the Indian Patents and Designs Act, 1911. Short title, extent
and commence-
ment.

(2) It extends to the whole of British India including British Baluchistan and the Santhal Parganas ; and

(3) It shall come into force on the first day of January 1912.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) “ Advocate General ” includes a Government Advocate :

(2) “ article ” means (as respects designs) any article of manufacture and any substance, artificial or natural, or partly artificial and partly natural :

(3) “ Controller ” means the Controller of Patents and Designs appointed under this Act :

(4) “ copyright ” means the exclusive right to apply a design to any article in any class in which the design is registered :

(5) “ design ” means any design applicable to any article, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining or any other means whatever, manual, mechanical or chemical, separate or combined, but does not include any trade or property mark as defined in sections 478 and 479 of the Indian Penal Code :

XLV of 1860.

(6) “ District Court ” has the meaning assigned to that expression by the Code of Civil Procedure, 1908 :

V of 1908.

(7) “ High Court ” has the meaning assigned to that expression by the Code of Criminal Procedure, 1898, in reference to proceeding against European British subjects :

(8) “ invention ” means any manner of new manufacture and includes an improvement and an alleged invention :

(9) "legal representative" means a person who in law represents the estate of a deceased person :

(10) "manufacture" includes any art, process or manner of producing, preparing or making an article, and also any article prepared or produced by manufacture :

(11) "patent" means a patent granted under the provisions of this Act :

(12) "patentee" means the person for the time being entitled to the benefit of a patent :

(13) "prescribed" includes prescribed by rules under this Act : and

(14) "proprietor of a new and original design,"—

(a) where the author of the design, for good consideration, executes the work for some other person, means the person for whom the design is so executed ; and

(b) where any person acquires the design or the right to apply the design to any article, either exclusively of any other person or otherwise, means, in the respect and to the extent in and to which the design or right has been so acquired, the person by whom the design or right is so acquired ; and

(c) in any other case, means the author of the design ; and where the property in, or the right to apply, the design has devolved from the original proprietor upon any other person, includes that other person.

PART I.

PATENTS.

Application for and Grant of Patent.

Application.

3. (1) An application for a patent may be made by any person whether he is a British subject or not, and whether alone or jointly with any other person.

(2) The application must be made in the prescribed form, and must be left at the Patent Office in the prescribed manner.

(3) The application must contain a declaration to the effect that the applicant is in possession of an invention, whereof he, or in the case of a joint application one at least of the applicants, claims to be the true and first inventor or the legal representative or assign of such inventor and for which he desires to obtain a patent, and must be accompanied by a specification and by the prescribed fee.

(4) Where the true and first inventor is not a party to the application, the application must contain a statement of his name, and such particulars for his identification as may be pre-

scribed, and the applicant must show that he is the legal representative or assign of such inventor.

4. (1) The specification must particularly describe and ascertain the nature of the invention and the manner in which the same is to be performed. Specification.

(2) Where the Controller deems it desirable, he may require that suitable drawings shall be supplied with the specification, or at any time before the acceptance of the application, and such drawings shall be deemed to form part of the specification.

(3) The specification must commence with the title, and must end with a distinct statement of the invention claimed.

(4) If in any particular case the Controller considers that an application should be further supplemented by a model or sample of anything illustrating the invention or alleged to constitute an invention, such model or sample as he may require shall be furnished before the acceptance of the application, but such model or sample shall not be deemed to form part of the specification.

5. (1) The Controller shall examine every application, and if he considers that— Proceedings upon application.

(a) the nature of the invention is not fairly described, or

(b) the application, specification and drawings have not been prepared in the prescribed manner or relate to more than one invention, or

(c) the title does not sufficiently indicate the subject-matter of the invention, or

(d) the statement of claim does not sufficiently define the invention, or

(e) the invention as described and claimed is *prima facie* not a new manufacture or improvement,

he may refuse to accept the application, or require that the application, specification or drawings be amended before he proceeds with the application; and in the latter case the application shall, if the Controller so directs, bear date as from the time when the requirement is complied with.

(2) Where the Controller refuses to accept an application or requires an amendment, the applicant may appeal from his decision to the Governor General in Council.

(3) The investigations required by this section shall not be held in any way to guarantee the validity of any patent, and no liability shall be incurred by the Governor General in Council or any officer by reason of, or in connection with, any such investigation, or any proceeding consequent thereon.

(4) Unless an application is accepted within twelve months from the date of the application, the application shall (except where an appeal has been lodged) become void:

Provided that where an application is made for an extension of time for the acceptance of an application, the Controller shall

on payment of the prescribed fee, grant an extension of time to the extent applied for but not exceeding three months.

Advertisement on acceptance of application.

6. On the acceptance of an application the Controller shall give notice thereof to the applicant and shall advertise the acceptance; and the application and specification with the drawings (if any) shall be open to public inspection.

Use of invention on acceptance of application.

7. Where an application for a patent in respect of an invention has been accepted, any use or publication of the invention during the period between the date of application and the date of sealing such patent shall not prejudice the patent to be granted for the invention :

Provided that an applicant shall not be entitled to institute any proceedings for infringement unless and until a patent for the invention has been granted to him.

Inquiry before sealing patent.

8. After acceptance of an application and before sealing a patent the Controller shall, if he thinks it advisable or is directed by the Governor General in Council so to do, refer the specification for inquiry and report to any person whom he thinks fit.

Opposition to grant of patent.

9. (1) Any person may, on payment of the prescribed fee, at any time within three months from the date of the advertisement of the acceptance of an application, give notice at the Patent Office of opposition to the grant of the patent on any of the following grounds, namely :—

(a) that the applicant obtained the invention from him, or from a person of whom he is the legal representative or assign ; or

(b) that the invention has been claimed in any specification filed in British India which is or will be of prior date to the patent, the grant of which is opposed ; or

(c) that the nature of the invention or the manner in which it is to be performed is not sufficiently or fairly described and ascertained in the specification ; or

(d) that the invention has been publicly used in any part of British India or has been made publicly known in any part of British India ;

but on no other ground.

(2) Where such notice is given, the Controller shall give notice of the opposition to the applicant, and shall, on the expiration of those three months, after hearing the applicant and the opponent, if desirous of being heard, decide on the case.

(3) The decision of the Controller shall be subject to appeal to the Governor General in Council.

Grant and sealing of patent.

10. (1) If there is no opposition, or, in case of opposition, if the determination is in favour of the grant of a patent, a patent shall, on payment of the prescribed fee, be granted, subject to such conditions (if any) as the Governor General in Council thinks expedient, to the applicant, or in the case of a joint application to the applicants jointly, and the Controller shall cause the patent to be sealed with the seal of the Patent Office.

(2) A patent shall be sealed as soon as may be, and not after the expiration of eighteen months from the date of application :

Provided that,—

- (a) where the Controller has allowed an extension of the time within which an application may be accepted, a further extension of four months after the said eighteen months shall be allowed for the sealing of the patent ;
- (b) where the sealing is delayed by an appeal to the Governor General in Council, or by a reference under section 8, or by opposition to the grant of the patent, the patent may be sealed at such time as the Controller may direct ;
- (c) where the patent is granted to the legal representative of an applicant who has died before the expiration of the time which would otherwise be allowed for sealing the patent, the patent may be sealed at any time within twelve months after the date of his death ;
- (d) where in consequence of the neglect or failure of the applicant to pay any fee a patent cannot be sealed within the period allowed by this section, that period may, on payment of the prescribed fee and on compliance with the prescribed conditions, be extended to such an extent as may be prescribed.

11. Except as otherwise expressly provided by this Act, ^{Date of patent} a patent shall be dated and sealed as of the date of the application :

Provided that no proceedings shall be taken in respect of an infringement committed before the publication of the specification.

12. (1) A patent sealed with the seal of the Patent Office shall, subject to the other provisions of this Act, confer on the patentee the exclusive privilege of making, selling and using the invention throughout British India and of authorizing others so to do. ^{Effect, extent and form of patent.}

(2) Every patent may be in the prescribed form and shall be granted for one invention only, but the specification may contain more than one claim ; and it shall not be competent for any person in a suit or other proceeding to take any objection to a patent on the ground that it has been granted for more than one invention.

13. (1) A patent granted to the true and first inventor or his legal representative or assign shall not be invalidated by an application in fraud of him, or by protection obtained thereon or by any use or publication of the invention subsequent to that fraudulent application during the period of protection. ^{Fraudulent applications for patents.}

(2) Where a patent has been revoked on the ground of fraud or on any other ground, the Controller may, on the ap-

plication of the true inventor or his legal representative or assign made in accordance with the provisions of this Act, grant to him a patent in lieu of and bearing the same date as the patent so revoked for any invention comprised in the revoked patent to which he was entitled :

Provided that no suit shall be brought for any infringement of the patent so granted committed before the actual date when such patent was granted.

Term of Patent.

Term of patent.

14. (1) The term limited in every patent for the duration thereof shall, save as otherwise expressly provided by this Act, be fourteen years from its date.

(2) A patent shall, notwithstanding anything therein or in this Act, cease if the patentee fails to pay the prescribed fees within the prescribed times :

Provided that the Controller, upon the application of the patentee, shall, on receipt of such additional fee as may be prescribed, enlarge the time to such an extent as may be applied for but not exceeding three months.

(3) If any proceeding is taken in respect of an infringement of the patent committed after a failure to pay any fee within the prescribed time, and before any enlargement thereof, the Court before which the proceeding is taken may, if it thinks fit, refuse to award any damages in respect of such infringement.

Extension of term of patent.

15. (1) A patentee may, after advertising in the prescribed manner his intention to do so, present a petition to the Governor General in Council praying that his patent may be extended for a further term ; but such petition must be left at the Patent Office at least six months before the time limited for the expiration of the patent and must be accompanied by the prescribed fee.

(2) Any person may give notice to the Controller of objection to the extension.

(3) Where a petition is presented under sub-section (1), the Governor General in Council may, as he thinks fit, dispose of the petition himself or refer it to a High Court for decision.

(4) If the petition be referred to a High Court, then on the hearing of such petition under this section the patentee, and any person who has given notice under sub-section (2) of objection, shall be made parties to the proceeding, and the Controller shall be entitled to appear and be heard.

(5) The Court to which the petition is referred shall, in considering its decision, have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case.

(6) If it appears to the Governor General in Council, or to the High Court when the petition has been referred to it, that the patentee has been inadequately remunerated by his patent,

the Governor General in Council or the High Court, as the case may be, may by order extend the term of the patent for a further term not exceeding seven, or, in exceptional cases, fourteen years, or may order the grant of a new patent for such term as may be specified in the order and subject to the payment of such fees as may be prescribed and containing any restriction, conditions and provisions which the Governor General in Council or the High Court, as the case may be, may think fit :

Provided that any patent so extended or granted shall, notwithstanding anything therein, or in this Act, cease if the inventor fails to pay before the expiration of each year the prescribed fee.

16. (1) Where any patent has ceased owing to the failure of the patentee to pay any prescribed fee within the prescribed time, the patentee may apply to the Controller in the prescribed manner for an order for the restoration of the patent Restoration of
lapsed patent

(2) Every such application shall contain a statement of the circumstances which have led to the omission of the payment of the prescribed fee.

(3) If it appears from such statement that the omission was unintentional or unavoidable and that no undue delay has occurred in the making of the application, the Controller shall advertise the application in the prescribed manner, and within such time as may be prescribed any person may give notice of opposition at the Patent Office.

(4) Where such notice is given the Controller shall notify the applicant thereof.

(5) After the expiration of the prescribed period the Controller shall hear the case and, subject to an appeal to the Governor General in Council, issue an order either restoring the patent subject to any conditions deemed to be advisable or dismissing the application :

Provided that in every order under this section restoring a patent such provisions as may be prescribed shall be inserted for the protection of persons who may have availed themselves of the subject-matter of the patent after the patent had ceased.

Amendment of Application or Specification.

17. (1) An applicant or a patentee may at any time, by request in writing left at the Patent Office and accompanied by the prescribed fee, seek leave to amend his application or specification, including drawings forming part thereof, by way of disclaimer, correction or explanation, stating the nature of, and the reasons for, the proposed amendment. Amendment of
application or
specification by
Controller.

(2) If the application for a patent has not been accepted, the Controller shall determine whether and subject to what conditions (if any) the amendment shall be allowed.

(3) In any other case the request and the nature of the proposed amendment shall be advertised in the prescribed manner,

and at any time within three months from its first advertisement any person may give notice at the Patent Office of opposition to the amendment.

(4) Where such a notice is given the Controller shall give notice of the opposition to the person making the request, and shall hear and decide the case.

(5) Where no notice of opposition is given, or the person so giving notice of opposition does not appear, the Controller shall determine whether and subject to what conditions, if any, the amendment ought to be allowed.

(6) The decision of the Controller in either case shall be subject to an appeal to the Governor General in Council.

(7) No amendment shall be allowed that would make the application or specification, as amended, claim an invention substantially larger than, or substantially different from, the invention claimed by the application or specification as it stood before amendment.

(8) Leave to amend shall be conclusive as to the right of the party to make the amendment allowed, except in case of fraud; and the amendment shall be advertised in the prescribed manner, and shall in all Courts and for all purposes be deemed to form part of the application or specification.

(9) This section shall not apply when and so long as any suit for infringement or proceeding before a Court for the revocation of the patent is pending.

Amendment of
specification by
the Court.

18. In any suit for infringement of a patent or proceeding before a Court for the revocation of a patent the Court may by order allow the patentee to amend his specification by way of disclaimer in such manner, and subject to such terms as to costs, advertisement or otherwise, as the Court may think fit:

Provided that no amendment shall be so allowed that would make the specification, as amended, claim an invention substantially larger than, or substantially different from, the invention claimed by the specification as it stood before the amendment, and where an application for such an order is made to the Court notice of the application shall be given to the Controller, and the Controller shall have the right to appear and be heard.

Restriction on
recovery of
damages.

19. Where an amendment of a specification by way of disclaimer, correction or explanation has been allowed under this Act, no damages shall be given in any suit in respect of the use of the invention before the disclaimer, correction or explanation, unless the patentee establishes to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge.

Register of Patents.

Register of
Patents.

20. (1) There shall be kept at the Patent Office a book called the Register of Patents, wherein shall be entered the names and addresses of grantees of patents, notifications of

assignments and of transmissions of patents, of licenses under patents, and of amendments, extensions, and revocations of patents, and such other matters affecting the validity or proprietorship of patents as may be prescribed.

(2) The register of inventions and address book existing at the commencement of this Act shall be incorporated with, and form part of, the register of patents under this Act.

(3) The register of patents shall be *prima facie* evidence of any matters by this Act directed or authorised to be inserted therein.

(4) Copies of deeds, licenses and any other documents affecting the proprietorship in any patent or in any license thereunder, must be supplied to the Controller in the prescribed manner for filing in the Patent Office, and, unless such copies have been so supplied, such deeds, licenses or other documents shall not be received as evidence of any transaction affecting a patent.

Crown.

21. Subject to any conditions which the Governor General Patent to bind in Council may have imposed, a patent shall have to all intents Crown. the like effect as against His Majesty as it has against a subject :

Provided that the officers or authorities administering any department of the service of His Majesty may, by themselves, their agents, contractors or others, at any time after the application, use the invention for the services of the Crown on such terms as may, either before or after the use thereof, be agreed on, with the approval of the Governor General in Council, between those officers or authorities and the patentee, or, in default of agreement, as may be settled by the Governor General in Council after hearing all parties interested.

Compulsory Licenses and Revocation.

22. (1) Any person interested may present a petition to Compulsory the Governor General in Council, which shall be left at the licenses and Patent Office, together with the prescribed fee, alleging that the revocation. reasonable requirements of the public with respect to a patented invention have not been satisfied, and praying for the grant of a compulsory license, or, in the alternative, for the revocation of the patent.

(2) The Governor General in Council shall consider the petition, and if the parties do not come to an arrangement between themselves the Governor General in Council may, as he thinks fit, either dispose of the petition himself or refer it to a High Court for decision.

(3) The provisions of sub-section (4) of section 15, prescribing the procedure to be followed in the case of references to the Court under that section, shall apply in the case of references made to the Court under this section.

(4) If the Governor General in Council is of opinion, or, where a reference has been made under sub-section (2) to a High

Court, that Court finds, that the reasonable requirements of the public with reference to the patented invention have not been satisfied, the patentee may be ordered to grant licenses on such terms as the Governor General in Council or the High Court, as the case may be, may think just, or, if the Governor General in Council or the High Court is of opinion that the reasonable requirements of the public will not be satisfied by the grant of licenses, the patent may be revoked by order of the Governor General in Council or the High Court :

Provided that an order of revocation shall not be made before the expiration of four years from the date of the patent, or if the patentee gives satisfactory reasons for his default.

(5) For the purposes of this section the reasonable requirements of the public shall not be deemed to have been satisfied—

(a) if by reason of the default of the patentee to manufacture to an adequate extent and supply on reasonable terms the patented article, or any parts thereof which are necessary for its efficient working, or to carry on the patented process to an adequate extent or to grant licenses on reasonable terms, any existing trade or industry or the establishment of any new trade or industry in British India is unfairly prejudiced, or the demand for the patented article or the article produced by the patented process is not reasonably met ; or

(b) if any trade or industry in British India is unfairly prejudiced by the conditions attached by the patentee before or after the commencement of this Act to the purchase, hire or use of the patented article or to the using or working of the patented process.

(6) An order of the Governor General in Council or of the High Court directing the grant of any license under this section shall, without prejudice to any other method of enforcement, operate as if it were embodied in a deed granting a license and made between the parties to the proceeding

**Revocation of
patents worked
outside British
India.**

23. (1) At any time not less than four years after the date of a patent granted under this Act, any person may apply to the Governor General in Council for the revocation of the patent on the ground that the patented article or process is manufactured or carried on exclusively or mainly outside British India.

(2) The Governor General in Council shall consider the application, and, if after inquiry, he is satisfied—

(a) that the allegations contained therein are correct ; and

(b) that the applicant is prepared, and is in a position, to manufacture or carry on the patented article or process in British India ; and

(c) that the patentee refuses to grant a license on reasonable terms,

then, subject to the provisions of this section, and unless the patentee proves that the patented article or process is manu-

factured or carried on to an adequate extent in British India, or gives satisfactory reasons why the article or process is not so manufactured or carried on, the Governor General in Council may make an order revoking the patent either—

- (i) forthwith; or
- (ii) after such reasonable interval as may be specified in the order, unless in the meantime it is shown to his satisfaction that the patented article or process is manufactured or carried on within British India to an adequate extent.

(3) No order revoking a patent shall be made under the last sub-section which is at variance with any treaty, convention, arrangement or engagement with any foreign country or British possession.

(4) The Governor General in Council may, on the application of the patentee, extend the time limited in any order made under sub-section (2), clause (ii), for such period not exceeding two years as he may specify in a subsequent order, or revoke any order made under sub-section (2), clause (ii), or any subsequent order if sufficient cause is, in his opinion, shown by the patentee.

24. A patentee may at any time, by giving notice in the prescribed manner to the Controller, offer to surrender his patent, and the Controller may, if after giving notice of the offer and hearing all parties who desire to be heard he thinks fit, accept the offer, and thereupon make an order for the revocation of the patent.

Power of
Controller to
revoke surrendered
patent.

25. A patent shall be deemed to be revoked if the Governor General in Council declares, by notification in the Gazette of India, the patent or the mode in which it is exercised to be mischievous to the State or generally prejudicial to the public.

Revocation of
patent on public
grounds.

Legal Proceedings.

26. (1) Revocation of a patent in whole or in part may be obtained on petition to a High Court on all or any of the following grounds, namely:—

Petition for
revocation of
patent.

- (a) that any invention included in the statement of claim is of no utility;
- (b) that any invention included in the statement of claim was not, at the date of the application for a patent, a new invention within the meaning of this Act;
- (c) that the applicant was not the true and first inventor thereof or the assign or legal representative of such inventor thereof;
- (d) that the original or any amended application or specification does not fulfil the requirements of this Act;
- (e) that the applicant has knowingly or fraudulently included in the application for a patent or in the

original or any amended specification, as his invention, something which was not new or whereof he was neither the inventor nor the assign nor the legal representative of such inventor ;

- (f) that the original or any subsequent application relating to the invention, or the original or any amended specification, contains a wilful or fraudulent misstatement ;
- (g) that a part of the invention or the manner in which a part is to be made and used as described in the original or any amended specification, is not thereby sufficiently described, and that this insufficiency was fraudulent or is injurious to the public.
- (2) A petition for revocation of a patent may be presented—
 - (a) by the Advocate General or any person authorized by him ; or
 - (b) by any person alleging—
- (i) that the patent was obtained in fraud of his rights, or of the rights of any person under or through whom he claims ; or
- (ii) that he, or any person under or through whom he claims, was the true and first inventor of any invention included in the claim of the patentee ; or
- (iii) that he, or any person under or through whom he claims an interest in any trade, business or manufacture, had publicly manufactured, used or sold, within British India, before the date of the patent, anything claimed by the patentee as his invention.

V of 1908.

(3) The High Court may, irrespective of any provisions of the Code of Civil Procedure, 1908, in this behalf, require any person, other than the Advocate General or any person authorized by him, applying for the revocation of a patent to give security for the payment of all costs incurred or likely to be incurred by any person appearing to oppose the petition.

Notice of proceedings to persons interested.

27. (1) Notice of any petition for revocation of patent under section 26 shall be served on all persons appearing from the register to be proprietors of that patent or to have shares or interests therein, and it shall not be necessary to serve the notice on any other person.

(2) The notice shall be deemed to be sufficiently served if a copy thereof is sent by post in a registered letter directed to the person and place for the time being stated in the register.

Framing issue for trial before other Courts.

28. (1) A High Court may, if it thinks fit, direct an issue for the trial, before itself or any other High Court, or any district Court, of any question arising upon a petition to itself under section 26, and the issue shall be tried accordingly.

(2) If the issue is directed to another High Court, the finding shall be certified by that Court to the High Court directing the issue.

(3) If the issue is directed to a District Court, the finding of the Court shall not be subject to appeal, but the evidence taken upon the trial shall be recorded and a copy thereof, certified by the Judge of the Court, shall be transmitted, together with any remarks which he may think fit to make thereon, to the High Court directing the issue, and the High Court may thereupon act upon the finding of the District Court, or dispose of the petition upon the evidence recorded, or direct a new trial, as the justice of the case may require

29. (1) A patentee may institute a suit in a District Court having jurisdiction to try the suit against any person who, during the continuance of a patent acquired by him under this Act in respect of an invention, makes, sells or uses the invention without his license, or counterfeits it, or imitates it. Suits for infringement of patents.

(2) Every ground on which a patent may be revoked under this Act shall be available by way of defence to a suit for infringement.

30. A patentee shall not be entitled to recover any damages in respect of any infringement of a patent granted after the commencement of this Act from any defendant who proves that at the date of the infringement he was not aware, nor had reasonable means of making himself aware, of the existence of the patent, and the marking of an article with the word "patent," "patented," or any word or words expressing or implying, that a patent has been obtained for the article, stamped, engraved, impressed on, or otherwise applied to the article, shall not be deemed to constitute notice of the existence of the patent unless the word or words are accompanied by the year and number of the patent: Exemption of innocent infringer from liability for damages.

Provided that nothing in this section shall affect any proceedings for an injunction.

31. In a suit for infringement of a patent, the Court may, on the application of either party, make such order for an injunction, inspection or account, and impose such terms and give such directions respecting the same and the proceedings thereon, as the Court may see fit. Order for inspection, etc., in suit.

32. In a suit for infringement of a patent the Court may certify that the validity of the patent came in question, and if the Court so certifies, then in any subsequent suit in that Court for infringement of the same patent the plaintiff, on obtaining a final order or judgment in his favour, shall, unless the Court trying the suit otherwise directs, have his full costs, charges and expenses of and incidental to the said suit properly incurred. Certificate of validity questioned and costs thereon.

33. A Court making a decree in a suit under section 29, or an order on a petition under section 26, shall send a copy of the decree or order, as the case may be, to the Controller, who shall cause an entry thereof and reference thereto to be made in the register of patents. Transmission of decrees and orders to the Controller.

34. A High Court to which a petition has been presented under section 26 may stay proceedings on, or dismiss, the petition if in its opinion the petition would be disposed of more justly or conveniently by another High Court. Power of High Court to stay proceedings, etc.

Hearing with
assessor.

35. (1) In a suit or proceeding for infringement or revocation of a patent, the Court may, if it thinks fit, and shall on the request of either of the parties to the proceedings, call in the aid of an assessor specially qualified, and try the case wholly or partially with his assistance.

(2) A Court exercising appellate jurisdiction in respect of such suit or proceeding may, if it thinks fit, call in the aid of an assessor as aforesaid.

(3) The remuneration, if any, to be paid to an assessor under this section shall in every case be determined by the Court and be paid by it as part of the expenses of the execution of this Act.

Remedy in case of
groundless threats
of legal proceeding.

36. Where any person claiming to be the patentee of an invention, by circulars, advertisements or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged infringement of the patent, any person aggrieved thereby may bring a suit against him in a District Court having jurisdiction to try the suit, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as he has sustained thereby, if the alleged infringement to which the threats related was not in fact an infringement of any legal rights of the person making such threats :

Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes a suit for infringement of his patent.

Miscellaneous.

Grant of patents to
two or more
persons.

37. Where, after the commencement of this Act, a patent is granted to two or more persons jointly, they shall, unless otherwise specified in the patent, be treated for the purpose of the devolution of the legal interest therein as joint tenants, but, subject to any contract to the contrary, each of such persons shall be entitled to use the invention for his own profit without accounting to the others, but shall not be entitled to grant a license without their consent, and, if any such person dies, his beneficial interest in the patent shall devolve on his legal representatives.

Novelty of
invention.

38. (1) An invention shall be deemed a new invention within the meaning of this Act—

- (a) if it has not, before the date of the application for a patent thereon, been publicly used in any part of British India, or been made publicly known in any part of British India, and
- (b) if the inventor has not by secret or experimental user made direct or indirect profits from his invention in excess of such an amount as the Court or the Governor General in Council, as the case may be, may, in consideration of all the circumstances of the case, deem reasonable.

(2) The public use or knowledge of an invention before the date of the application for a patent thereon shall not be deemed

a public use or knowledge within the meaning of this Act if the knowledge has been obtained surreptitiously or in fraud of the true and first inventor or has been communicated to the public in fraud of such inventor or in breach of confidence:

Provided that such inventor has not acquiesced in the public use of his invention, and that, within six months after the commencement of that use, he applies for a patent.

39. If a patent is lost or destroyed, or its non-production is accounted for to the satisfaction of the Controller, the Controller may at any time, on payment of the prescribed fee, seal a duplicate thereof.

40. (1) The exhibition of an invention at an industrial or international exhibition, certified as such by the Governor General in Council, or the publication of any description of the invention during the period of the holding of the exhibition, or the use of the invention for the purpose of the exhibition in the place where the exhibition is held, or the use of the invention during the period of the holding of the exhibition by any person elsewhere, without the privity or consent of the inventor, shall not prejudice the right of the inventor to apply for and obtain a patent in respect of the invention or the validity of any patent granted on the application:

Provided that—

- (a) the exhibitor, before exhibiting the invention, gives the Controller the prescribed notice of his intention to do so; and
- (b) the application for a patent is made before or within six months from the date of the opening of the exhibition.

(2) The Governor General in Council may, by notification in the Gazette of India, apply this section to any exhibition mentioned in the notification in like manner as if it were an industrial or international exhibition certified as such by the Governor General in Council, and any such notification may provide that the exhibitor shall be relieved from the condition of giving notice to the Controller of his intention to exhibit, and shall be so relieved either absolutely or upon such terms and conditions as may be stated in the notification.

41. The trustees of the Indian Museum may at any time require a patentee to furnish them with a model or sample of his invention on payment to the patentee of the cost of the manufacture of the model or sample, the amount to be settled, in case of dispute, by the Governor General in Council.

42. (1) A patent shall not prevent the use of an invention for the purposes of the navigation of a foreign vessel within the jurisdiction of any Court in British India, or the use of an invention in a foreign vessel within that jurisdiction, provided it is not used therein for or in connection with the manufacture or preparation of anything intended to be sold in or exported from British India.

(2) This section shall not extend to vessels of any foreign State of which the laws do not confer corresponding right with

respect to the use of inventions in British vessels while in the ports of that State, or in the waters within the jurisdiction of its Courts.

PART II.

DESIGNS.

Registration of Designs.

Application for
registration of
designs.

43. (1) The Controller may, on the application of any person claiming to be the proprietor of any new or original design not previously published in British India, register the design under this Part.

(2) The application must be made in the prescribed form and must be left at the Patent Office in the prescribed manner and must be accompanied by the prescribed fee.

(3) The same design may be registered in more than one class, and, in case of doubt as to the class in which a design ought to be registered, the Controller may decide the question.

(4) The Controller may, if he thinks fit, refuse to register any design presented to him for registration; but any person aggrieved by any such refusal may appeal to the Governor General in Council.

(5) An application which, owing to any default or neglect on the part of the applicant, has not been completed so as to enable registration to be effected within the prescribed time shall be deemed to be abandoned.

(6) A design when registered shall be registered as of the date of the application for registration.

Registration of
designs in new
classes.

44. Where a design has been registered in one or more classes of goods, the application of the proprietor of the design to register it in some one or more other classes shall not be refused, nor shall the registration thereof be invalidated—

(a) on the ground of the design not being a new and original design, by reason only that it was so previously registered; or

(b) on the ground of the design having been previously published in British India, by reason only that it has been applied to goods of any class in which it was so previously registered.

Certificate of
registration.

45 (1) The Controller shall grant a certificate of registration to the proprietor of the design when registered.

(2) The Controller may, in case of loss of the original certificate or in any other case in which he deems it expedient, furnish one or more copies of the certificate.

Register of
Designs.

46. (1) There shall be kept at the Patent Office a book called the Register of Designs, wherein shall be entered the names and addresses of proprietors of registered designs, notifications of assignment and of transmissions of registered designs, and such other matters as may be prescribed.

(2) The register of designs existing at the commencement of this Act shall be incorporated with and form part of the register of designs under this Act.

(3) The register of designs shall be *prima facie* evidence of any matters by this Act directed or authorized to be entered therein.

Copyright in Registered Designs.

47. (1) When a design is registered, the registered proprietor of the design shall, subject to the provisions of this Act, have copyright in the design during five years from the date of registration. Copyright on registration.

(2) If within the prescribed time before the expiration of the said five years application for the extension of the period of copyright is made to the Controller in the prescribed manner, the Controller shall, on payment of the prescribed fee, extend the period of copyright for a second period of five years from the expiration of the original period of five years.

(3) If within the prescribed time before the expiration of such second period of five years application for the extension of the period of copyright is made to the Controller in the prescribed manner, the Controller may, subject to any rules under this Act, on payment of the prescribed fee, extend the period of copyright for a third period of five years from the expiration of the second period of five years.

48. (1) Before delivery on sale of any articles to which a registered design has been applied, the proprietor shall— Requirements before delivery on sale.

(a) (if exact representations or specimens were not furnished on the application for registration), furnish to the Controller the prescribed number of exact representations or specimens of the design; and, if he fails to do so, the Controller may erase his name from the register, and thereupon the copyright in the design shall cease; and

(b) cause each such article to be marked with the prescribed mark, or with the prescribed words or figures, denoting that the design is registered; and, if he fails to do so, the proprietor shall not be entitled to recover any penalty or damages in respect of any infringement of his copyright in the design unless he shows that he took all proper steps to ensure the marking of the article, or unless he shows that the infringement took place after the person guilty thereof knew or had received notice of the existence of the copyright in the design.

(2) Where a representation is made to the Governor General in Council by or on behalf of any trade or industry that in the interests of the trade or industry it is expedient to dispense with or modify as regards any class or description of articles any of the requirements of this section as to marking, the Governor General in Council may, if he thinks fit, by rule under this Act, dispense with or modify such requirements as regards any such

class or description of articles to such extent and subject to such conditions as he thinks fit.

Effect of disclosure
on copyright.

49. The disclosure of a design by the proprietor to any other person, in such circumstances as would make it contrary to good faith for that other person to use or publish the design, and the disclosure of a design in breach of good faith by any person other than the proprietor of the design, and the acceptance of a first and confidential order for goods bearing a new or original textile design intended for registration, shall not be deemed to be a publication of the design sufficient to invalidate the copyright thereof if registration thereof is obtained subsequently to the disclosure or acceptance.

Inspection of
registered designs.

50. (1) During the existence of copyright in a design, or such shorter period not being less than two years from the registration of the design as may be prescribed, the design shall not be open to inspection except by the proprietor or a person authorized in writing by him, or a person authorized by the Controller or by the Court, and furnishing such information as may enable the Controller to identify the design, and shall not be open to the inspection of any person except in the presence of the Controller, or of an officer acting under him, and on payment of the prescribed fee; and the person making the inspection shall not be entitled to make any copy of the design, or of any part thereof:

Provided that, where registration of a design is refused on the ground of identity with a design already registered, the applicant for registration shall be entitled to inspect the design so registered.

(2) After the expiration of the copyright in a design, or such shorter period as aforesaid, the design shall be open to inspection, and copies thereof may be taken by any person on payment of the prescribed fee.

(3) Different periods may be prescribed under this section for different classes of goods.

Information as to
existence of
copyright.

51. On the request of any person furnishing such information as may enable the Controller to identify the design, and on payment of the prescribed fee, the Controller shall inform such person whether the registration still exists in respect of the design, and, if so, in respect of what classes of goods, and shall state the date of registration, and the name and address of the registered proprietor.

Industrial and International Exhibitions.

Provisions as to
exhibitions.

52. (1) The exhibition at an industrial or international exhibition certified as such by the Governor General in Council, or the exhibition elsewhere during the period of the holding of the exhibition, without the privity or consent of the proprietor, of a design, or of any article to which a design is applied, or the publication during the holding of any such exhibition, of a description of a design, shall not prevent the design from being registered, or invalidate the registration thereof:

Provided that—

(a) the exhibitor, before exhibiting the design or article, or

publishing a description of the design, gives the Controller the prescribed notice of his intention to do so; and

- (b) the application for registration is made before or within six months from the date of the opening of the exhibition.

(2) The Governor General in Council may, by notification in the Gazette of India, apply this section to any exhibition mentioned in the notification in like manner as if it were an industrial or international exhibition certified as such by the Governor General in Council, and any such notification may provide that the exhibitor shall be relieved from the condition of giving notice to the Controller of his intention to exhibit, and shall be so relieved either absolutely or upon such terms and conditions as may be stated in the notification.

Legal Proceedings.

53. (1) During the existence of copyright in any design it shall not be lawful for any person— Piracy of registered design

- (a) for the purpose of sale to apply or cause to be applied to any article in any class of goods in which the design is registered the design or any fraudulent or obvious imitation thereof, except with the license or written consent of the registered proprietor, or to do anything with a view to enable the design to be so applied; or,
- (b) knowing that the design or any fraudulent or obvious imitation thereof has been applied to any article without the consent of the registered proprietor, to publish or expose or cause to be published or exposed for sale that article.

(2) If any person acts in contravention of this section, he shall be liable for every contravention—

- (a) to pay to the registered proprietor of the design a sum not exceeding five hundred rupees recoverable as a contract debt, or
- (b) if the proprietor elects to bring a suit for the recovery of damages for any such contravention, and for an injunction against the repetition thereof, to pay such damages as may be awarded and to be restrained by injunction accordingly:

Provided that the total sum recoverable in respect of any one design under clause (a) shall not exceed one thousand rupees.

(3) When the Court makes a decree in a suit under subsection (2), it shall send a copy of the decree to the Controller, who shall cause an entry thereof to be made in the register of designs.

54. The provisions of this Act with regard to certificates of the validity of a patent, and to the remedy in case of groundless Application of certain provisions

of the Act as to
patents to designs.

threats of legal proceedings by a patentee shall apply in the case of registered designs in like manner as they apply in the case of patents, with the substitution of references to the copyright in a design for references to a patent, and of references to the proprietor of a design for references to the patentee, and of references to the design for references to the invention.

PART III.

GENERAL.

Patent Office and Proceedings thereat.

Patent Office.

55. (1) The Governor General in Council may provide, for the purposes of this Act, an office which shall be called, and is in this Act referred to as, the Patent Office.

(2) The Patent Office shall be under the immediate control of the Controller of Patents and Designs, who shall act under the superintendence and direction of the Governor General in Council.

(3) There shall be a seal for the Patent Office.

(4) Any act or thing directed to be done by or to the Controller may be done by or to any officer authorized by the Governor General in Council.

Officers and clerks.

56. The Governor General in Council may appoint the Controller, and so many officers and clerks, with such designations and duties, as he thinks fit.

Fees.

Fees.

57. (1) There shall be paid in respect of the grant of patent and the registration of designs, and applications therefor, and in respect of other matters with relation to the patents and designs under this Act, such fees as may be prescribed by the Governor General in Council, so however that the fees prescribed in respect of the instruments and matters mentioned in the schedule shall not exceed those there specified.

(2) A proceeding in respect of which a fee is payable under this Act or the rules made thereunder shall be of no effect unless the fee has been paid.

Provisions as to Registers and other Documents in the Patent Office.

Notice of trust not
to be entered in
registers.

58. There shall not be entered in any register kept under this Act, or be receivable by the Controller, any notice of any trust, expressed, implied or constructive.

Inspection of and
extracts from
registers.

59. Every register kept under this Act shall at all convenient times be open to the inspection of the public, subject to the provisions of this Act; and certified copies, sealed with the seal of the Patent Office, of any entry in any such register shall be

given to any person requiring the same on payment of the prescribed fee.

60. Reports of or to the Controller made under this Act shall not in any case be published or be open to public inspection. Privilege of reports of Controller

61. (1) Where an application for a patent has been abandoned or become void, the specifications and drawing (if any), accompanying or left in connection with such application, shall not, save as otherwise expressly provided by this Act, at any time be open to public inspection or be published by the Controller. Prohibition of publication of specification, drawings, etc., where application abandoned, etc.

(2) Where an application for a design has been abandoned or refused, the application and any drawings, photographs, tracings, representations or specimens left in connection with the application shall not at any time be open to public inspection or be published by the Controller.

62. The Controller may, on request in writing accompanied by the prescribed fee,— Power for Controller to correct clerical errors.

- (a) correct any clerical error in or in connection with an application for a patent or in any patent or any specification ;
- (b) cancel the registration of a design either wholly or in respect of any particular goods in connection with which the design is registered ;
- (c) correct any clerical error in the representation of a design or in the name or address of the proprietor of any patent or design, or in any other matter which is entered upon the register of patents or the register of designs.

63. (1) Where a person claims to be entitled by assignment, transmission or other operation of law to a patent, or to the copyright in a registered design, the Controller shall, on request and on proof of title to his satisfaction, register his interest in such patent or design. Entry of assignments and transmissions in registers.

(2) Where any person claims to be entitled as mortgagee, licensee or otherwise to any interest in a patent or registered design, the Controller shall, on request and on proof of title to his satisfaction, cause notice of the interest to be entered in the prescribed manner in the register of patents or designs, as the case may be.

(3) The person registered as the proprietor of a patent or design shall, subject to the provisions of this Act and to any rights appearing from the register to be vested in any other person, have power absolutely to assign, grant licenses as to, or otherwise deal with, the patent or design and to give effectual receipts for any such assignment, license or dealing:

Provided that any equities in respect of the patent or design may be enforced in like manner as in respect of any other moveable property.

64. (1) A High Court may, on the application in the prescribed manner of any person aggrieved by the non-insertion in or Rectification of register by Court.

omission from the register of patents or designs of any entry, or by any entry made in either such register without sufficient cause, or by any entry wrongly remaining on either such register, or by an error or defect in any entry in either such register, make such order for making, expunging or varying such entry as it may think fit.

(2) The Court may in any proceeding under this section decide any question that it may be necessary or expedient to decide in connection with the rectification of a register.

(3) The prescribed notice of any application under this section shall be given to the Controller, who shall have the right to appear and be heard thereon.

(4) Any order of the Court rectifying a register shall direct that notice of the rectification be served on the Controller in the prescribed manner, who shall upon the receipt of such notice rectify the register accordingly.

(5) A High Court to which an application has been made under this section may stay proceedings on or dismiss the application if in its opinion the application would be disposed of more justly or conveniently by another High Court.

Powers and Duties of Controller.

Powers of
Controller in
proceedings under
Act.

65. Subject to any rules in this behalf, the Controller in any proceedings before him under this Act shall have the powers of a Civil Court for the purpose of receiving evidence and administering oaths and enforcing the attendance of witnesses and compelling the production of documents and awarding costs.

Publication of
patented
inventions.

66. The Controller shall issue periodically a publication of patented inventions containing such information as the Governor General in Council may direct.

Exercise of
discretionary
power by
Controller.

67. Where any discretionary power is by or under this Act given to the Controller, he shall not exercise that power adversely to the applicant for a patent, or for amendment of an application or of a specification, or for registration of a design without (if so required within the prescribed time by the applicant) giving the applicant an opportunity of being heard.

Power of
Controller to take
directions of
Governor General
in Council.

68. The Controller may, in any case of doubt or difficulty arising in the administration of any of the provisions of this Act, apply to the Governor General in Council for directions in the matter.

Refusal to grant
patent, etc., in
certain cases.

69. The Controller may refuse to grant a patent for an invention, or to register a design, of which the use would, in his opinion, be contrary to law or morality.

Appeals to the
Governor General
in Council.

70. (1) Where an appeal is declared by this Act to lie from the Controller to the Governor General in Council, the appeal shall be made within two months of the date of the order passed by the Controller, and shall be in writing, and accompanied by the prescribed fee.

(2) In calculating the said period of two months the time (if any) occupied in granting a copy of the order appealed against shall be excluded.

(3) The Governor General in Council may, if he thinks fit,

obtain the assistance of an expert in deciding such appeals, and the decision of the Governor General in Council shall be final.

Evidence, etc.

71. A certificate purporting to be under the hand of the Controller as to any entry, matter or thing which he is authorised by this Act, or any rules made thereunder, to make or do, shall be *prima facie* evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or left undone. Certificate of Controller to be evidence.

72. Copies of all specifications, drawings and amendments left at the Patent Office after the commencement of this Act, printed for and sealed with the seal of the Patent Office, shall be transmitted as soon as may be, after they have been accepted or allowed at the Patent Office, to the Governor of Fort St. George in Council, the Governor of Bombay in Council, the Lieutenant-Governor of Burma and to such other authorities as the Governor General in Council may appoint in this behalf, and shall be open to the inspection of any person at all reasonable times at places to be appointed by those authorities. Transmission of certified printed copies of specifications, etc.

73. Any application, notice or other document authorized or required to be left, made or given at the Patent Office or to the Controller, or to any other person under this Act, may be sent by post. Applications and notices by post.

74. (1) If any person is, by reason of infancy, lunacy or other disability, incapable of making any statement or doing any thing required or permitted by or under this Act, the lawful guardian, committee or manager (if any) of the person subject to the disability, or, if there be none, any person appointed by any Court possessing jurisdiction in respect of his property, may make such statement or a statement as nearly corresponding thereto as circumstances permit, and do such thing in the name and on behalf of the person subject to the disability. Declaration by infant, lunatic, etc.

(2) An appointment may be made by the Court for the purposes of this section upon the petition of any person acting on behalf of the person subject to the disability or of any other person interested in the making of the statement or the doing of the thing.

Agency.

75. The following documents, namely,—

- (1) applications for a patent,
- (2) notices of opposition,
- (3) applications for extension of term of a patent,
- (4) applications for the restoration of lapsed patents,
- (5) applications for leave to amend,
- (6) applications for compulsory license or revocation, and
- (7) notices of surrenders of patent,

shall be signed and verified, in the manner prescribed, by the person making such applications or giving such notices :

Provided that, if such person is absent from British India, they may be signed and verified on his behalf by an agent resi-

Subscription and verification of certain documents

dent in British India authorized by him in writing in that behalf.

Agency.

76. (1) All other applications and communications to the Controller under this Act may be signed by, and all attendances upon the Controller may be made by or through a legal practitioner or by or through an agent authorized to the satisfaction of the Controller.

(2) The Controller may, if he sees fit, require—

- (a) any such agent to be resident in British India ;
- (b) any person not residing in British India to employ an agent residing in British India ;
- (c) the personal signature or presence of any applicant, opponent or other person.

Powers, etc., of Governor General in Council.

Power for Governor General in Council to make rules.

77. (1) The Governor General in Council may make such rules as he thinks expedient, subject to the provisions of this Act—

- (a) for regulating the practice of registration under this Act ;
 - (b) for classifying goods for the purposes of designs ;
 - (c) for making or requiring duplicates of specifications, drawings and other documents ;
 - (d) for securing and regulating the publishing and selling of copies, at such prices and in such manner as the Governor General in Council thinks fit, of specifications, drawings and other documents ;
 - (e) for securing and regulating the making, printing, publishing, and selling of indexes to, and abridgments of, specifications and other documents in the Patent Office ; and providing for the inspection of indexes and abridgments and other documents ;
 - (f) generally for regulating the business of the Patent Office, the conduct of proceedings before the Controller, and all things by this Act placed under the direction or control of the Controller or of the Governor General in Council ; and
 - (g) generally for the purpose of carrying into effect the provisions of this Act.
- (2) The power to make rules under this section shall be subject to the condition of the rules being made after previous publication.
- (3) All rules made under this section shall be published in the *Gazette of India*, and on such publication shall have effect as if enacted in this Act.

Offences.

Wrongful use of words "Patent Office."

78. If any person uses on his place of business, or on any document issued by him, or otherwise, the words "Patent Office," or any other words suggesting that his place of business is officially connected with, or is, the Patent Office, he shall be punishable

with fine which may extend to two hundred rupees, and, in the case of a continuing offence, with further fine of twenty rupees for each day on which the offence is continued after conviction thereof.

78 A.¹ (1) If His Majesty is pleased by order in Council to apply such of the provisions of section 91 of the Patents and Designs Act, 1907, as relate to inventions or designs to British India, then any person who has applied for protection for any invention or design in the United Kingdom shall be entitled to a patent for his invention or to registration of his design under this Act, in priority to other applicants; and the patent or registration shall have the same date as the date of the application in the United Kingdom:

Reciprocal arrangements with the United Kingdom and other parts of His Majesty's dominions.

Provided that—

- (a) the application is made in the case of a patent within twelve months, and in the case of a design, within four months from the application for protection in the United Kingdom; and
- (b) nothing in this section shall entitle the patentee or the proprietor of the design to recover damages for infringements happening prior to the actual date on which, in the case of a patent, his application is accepted, or in the case of a design, the design is registered, in British India.

(2) The patent granted for an invention or the registration of a design shall not be invalidated—

- (a) in the case of a patent, by reason only of the publication of a description of, or use of, the invention, or
- (b) in the case of a design, by reason only of the exhibition or use of, or the publication of a description or representation of the design in British India during the period specified in this section as that within which the application may be made.

(3) The application for the grant of a patent or the registration of a design under this section must be made in the same manner as an ordinary application under this Act:

Provided that in the case of a patent, if the application is not accepted within twelve months from the date of the application for protection in the United Kingdom, the specification and the drawings (if any) supplied therewith shall be open to public inspection at the expiration of that period.

(4) Where it is made to appear to the Governor General in Council that the legislature of any other part of His Majesty's dominions has made satisfactory provision for the protection of inventions or designs, patented or registered in British India, the Governor General in Council may by notification in the *Gazette of India*, direct that the provisions of this section with such variations or additions, if any, as may be set out in such notifica-

¹ New section inserted by the Indian Patents and Designs (Amendment) Act (Act XXIX of 1920).

tion, shall apply for the protection of inventions or designs patented or registered in that part of His Majesty's dominions

Savings and Repeal.

Saving for
prerogative.

79. Nothing in this Act shall take away, abridge or prejudicially affect the prerogative of the Crown in relation to the granting of any letters patent or to the withholding of a grant thereof

Repeal.

80. The Inventions and Designs Act, 1888. is hereby repealed : V of 1888

Provided that this repeal shall not affect any application under the said Act pending at the commencement of this Act, and all proceedings on such application shall be continued as if this Act had not been passed.

Substitution of
patents for rights
under repealed
Act.

81. (1) At any time within two years from the commencement of this Act, any person possessing an exclusive privilege under the Inventions and Designs Act, 1888, may, by request in writing left at the Patent Office and on payment of the prescribed fee, seek leave to convert his exclusive privilege under the said Act into a patent under this Act. V of 1888

(2) Notice of any application under this section shall be sent to all persons appearing from the address book kept under the said Act to have any shares or interests in the exclusive privilege.

(3) Save as aforesaid, the procedure prescribed by section 17 in the case of applications under that section shall, so far as may be, apply to every application under this section.

(4) Every patent granted under this section shall be dated as of the date of the exclusive privilege for which it is substituted.

THE SCHEDULE

(See section 57.)

FEEs.

| | Rs. |
|---|-----|
| On application for a patent | 10 |
| Before sealing a patent | 30 |
| Before the expiration of the 4th year from the date of the patent. | 50 |
| Before the expiration of the 5th year from the date of the patent. | 50 |
| Before the expiration of the 6th year from the date of the patent. | 50 |
| Before the expiration of the 7th year from the date of the patent. | 50 |
| Before the expiration of the 8th year from the date of the patent. | 50 |
| Before the expiration of the 9th year from the date of the patent. | 100 |
| Before the expiration of the 10th year from the date of the patent. | 100 |
| Before the expiration of the 11th year from the date of the patent. | 100 |
| Before the expiration of the 12th year from the date of the patent. | 100 |

| | |
|--|---------|
| Before the expiration of the 13th year from the date of the patent : | Rs. 100 |
| Provided that the fees for two or more years may be paid in advance. | |
| On application to extend term of a patent | 50 |
| Before the expiration of each year of the extended term of a patent or of a new patent granted under section 15. | 100 |
| On application for registration of a design | 3 |

ACT VI OF 1915.

PATENTS AND DESIGNS (TEMPORARY RULES) ACT.

(Passed 22nd March, 1915.)

An Act to extend the powers of the Governor General in Council during the continuance of the present war to make rules under the Indian Patents and Designs Act, 1911.

Short title.

1. (1) This Act may be called the Indian Patents and Designs (Temporary Rules) Act, 1915.

(2) It extends to the whole of British India including British Baluchistan and the Santhal Parganas.

(3) This Act and the rules made thereunder shall be in force during the continuance¹ of the present war and for a period of one year and six months² thereafter.

Definitions.

2. In this Act the expression subject of any State at war with His Majesty includes:—

- (i) any person resident and carrying on business in the territory of a state at war with His Majesty; and
- (ii) with reference to a company, any company the business whereof is managed or controlled by such subjects, or is carried on wholly or mainly for the benefit or on behalf of such subjects, notwithstanding that the company may be registered within His Majesty's dominions.

Power to make rules.

3. (1) The power of the Governor General in Council under section 77 of the Indian Patents and Designs Act, 1911, to make rules shall include power to make rules—

- (a) for avoiding or suspending in whole or in part any patent or license, the person entitled to the benefit of which is the subject of any State at war with His Majesty;
- (b) for avoiding or suspending the registration, and all or any rights conferred by the registration, of any design the proprietor whereof is a subject as aforesaid;
- (c) for avoiding or suspending any application made by any such person under the said Act;
- (d) for enabling the grant, in favour of persons other than such persons as aforesaid, on such terms and conditions, and either for the whole term of the patent

Under the provisions of the Termination of the Present War (Definition) Act (V of 1919), the present war shall be treated as having continued to and as having ended on such date as His Majesty in Council may declare in that behalf.

² Altered from "six months" by the Indian Patents and Designs (Temporary Rules) Amendment Act (XXVIII of 1920).

or registration or for such less period, as may be thought fit, of licenses to make, use, exercise, or vend, patented inventions and registered designs so liable to avoidance or suspension as aforesaid; and
 (e) for extending the time within which any act or thing may be or is required to be done under the said Act.

(2) If the rules made under this Act so provide, the rules or any of them shall have effect from the passing of this Act.

(3) All rules made under this Act shall be published in the *Gazette of India*, and on such publication shall have effect as if enacted in this Act.

4. The power to make rules conferred by section 3 (1) (a) and (d) of this Act shall be exercisable in respect of any exclusive privilege acquired under the Inventions and Designs Act, 1888, V of 1888. as if such exclusive privilege had been a patent granted under the Indian Patents and Designs Act, 1911; and the power to make rules conferred by section 3 II of 1911. (1) (e) of this Act in respect of any thing to be done under the Indian Patents and Designs Act, 1911, shall be exercisable II of 1911. in respect of any thing to be done under the Inventions and Designs Act, 1888. V of 1888

APPENDIX.

PART II.

No. 1959-P.—In exercise of the powers conferred by sections 57 and 77 (1) of the Indian Patents and Designs Act, 1911 (II of 1911), the Governor General in Council is pleased to make the following rules.

Indian Patents and Designs Rules, 1912.

(As amended by notification No. 15757-22, dated 16-10-1915 of the Government of India.)

CHAPTER I.

Preliminary.

Short title and commencement. 1. These rules may be called the Indian Patents and Designs Rules, 1912.

They shall come into force on the first day of January, 1912.

Definitions. 2. In the rules, unless there is anything repugnant in the subject or context.

(a) The Act means the Indian Patents and Designs Act, 1911.

(b) Office means the Patent Office provided under section 55 of the Act.

(c) Controller means the Controller of Patents and Designs appointed under section 56 of the Act, and includes any officer appointed to act for him.

3. Any application, notice, or other document, and any fee, authorised or required to be left, made, given or paid at the office, or to the Controller, may be sent by hand or through the post addressed to the Controller of Patents and Designs, 1, Council House Street, Calcutta, and, if so sent, shall be deemed to have been left, made, given or paid on the day of receipt.

4. (1) The fees to be paid under the Act shall be those specified in the first Schedule to these rules, hereinafter described as the prescribed fees.

(2) Fees may be paid in cash at the office, or may be sent by money order or postal order or cheque payable to the Controller at Calcutta. Cheques not carrying the correct addition for Commission, and other cheques on which the full value cannot be collected in cash within the time allowed for payment of the fee, will only be accepted at the discretion of the Controller. Stamps will not be received in payment of fees.

Application, etc., 5. All applications, notices, requests, appeals or to be accompanied documents on which a fee is leviable under these rules by the prescribed fee. shall be accompanied by the prescribed fee.

6. The forms set forth in the second schedule to these rules, with such variations as the circumstances of each case require, shall be used for the respective purposes therein mentioned, and if used shall be sufficient.

Forms.

Documents.

7. (1) All documents and copies of documents, except drawings, sent to or left at the office or otherwise furnished to the Controller shall be written, type-written, lithographed, or printed in the English language (unless otherwise directed) in large and legible characters with deep permanent in upon strong white paper, and on one side only, of a size

approximately of 13 inches by 8 inches, leaving a margin of at least one inch and a half on the left hand part thereof. Signatures thereto must be written in a large and legible hand, and a vernacular signature must be accompanied by a transliteration in English.

(2) Duplicate documents shall be filed at the Office, if at any time required by the Controller.

(3) Names and addresses of applicants and other persons shall be given in full, together with such other particulars of nationality, caste or calling as are necessary for identification.

8. The documents specified in S. 75 of the Act shall be dated and signed at the foot, and shall contain a statement that verification of documents specified in S. 75 of the Act. the facts and matters stated therein are true to the best of the knowledge, information and belief of the person signing them.

9. (1) For all matters falling under the provisions of S. 76 of the Act, any person may, unless otherwise directed by the Agency. Controller, authorise, under his personal signature, any other person to act as his agent and to receive all notices, requisitions and communications. The authority may be given on Form 26.

(2) If he does not desire to authorise any other person to act as his Agent, but wishes notice, requisitions and communications to be sent to a particular address, he may notify the same to the Controller on Form 27,

CHAPTER II.—PATENTS.

Applications for grant of Patent.

10. (1) An application, under section 3 of the Act, for a patent shall be made on Form 1 or Form 2, and shall be accompanied by a specification, prepared in duplicate in accordance with Form 3.

(2) Applications shall, as far as may be practicable, be numbered and dated in the order of their receipt.

(3) If the true and first inventor, or any other applicant is in the service of the Crown, he shall disclose that fact in the application and shall state the office he holds.

(4) If the true and first inventor does not wish to be a party to the application, the applicant shall produce the original deed of assignment or other document under which he is enabled to apply for a patent, unless the application itself is endorsed by the true and first inventor in the presence of two witnesses with a statement that the said inventor agrees that the application shall be made without his name as an applicant for a patent.

(5) If the application is made by the legal representative of a deceased inventor, the legal representative shall produce for inspection the probate of the will or the letters of administration of the estate of the inventor, or a certified copy of such probate or letters, or such other evidence of his title as the Controller may require.

Specifications.

11. (1) The specification shall commence with the title of the invention and the name of the applicant as in the application. It shall terminate with a clear and succinct statement of the invention claimed, distinct from the body of the specification and shall be signed by the applicant or his agent.

(2) Where the invention is capable of representation by drawings, such drawings shall be prepared in accordance with rule 13 and shall be supplied with, and referred to in detail, in the specification.

(3) Irrelevant or other matter, not necessary, in the opinion of the Controller, for elucidation of the invention, shall be excluded from the title, description, claims and drawings.

12. (1) When the specification, or any drawing accompanying it, is defective and requires amendment, one copy shall be returned to the applicant or his agent and all alterations shall be made thereon as far as possible. Additions shall be made thereon as far as possible. Additions shall be made thereon as far as possible.

tional matter may be interpolated if necessary by re-writing such pages as are required to form a continuous document. Amendments shall not be made by slips pasted on, or as footnotes, or by writing in the margin. The amended documents shall be returned to the Controller together with the cancelled pages or drawings, if any, and with a duplicate of any pages or drawings that have been amended or added.

(2) Amendments, alterations or additions shall be initialled by the applicant or his agent.

(3) No amendments, alterations or additions shall be made in a document returned for amendment beyond those necessary to comply with the requirements of the Controller.

(4) When a specification comprises more than one invention, and it is considered by the Controller or the applicant that the application should be restricted to one invention, the additional inventions may be made the subject-matter of additional applications. Any such application, if made before the acceptance of the original application, shall, on the request of the applicant, bear date of the original application and shall be proceeded with as substantive applications of that date."

13. (1) Drawings shall be supplied in duplicate on sheets 13 inches in height and either 8 or 16 inches in width. A clear margin of half an inch shall be left round each sheet.

The figures of the drawing shall be numbered consecutively Fig. 1, Fig. 2, etc., and shall be placed upright on the sheets. Reference figures and letters shall be clear and bold, not less than 1/8 of an inch in height, and the same letters shall be used for the same parts in different views or drawings. The sheets of drawings, when more than one, shall be numbered consecutively, the number of each sheet being shown in the right-hand top corner. Each sheet shall be signed by the applicant or his agent in the bottom right-hand corner.

(2) No written description of the invention shall appear on the sheets of drawings.

(3) At least one copy of the drawings shall be suitable for reproduction and, for that purpose, shall be prepared on tracing cloth or on smooth white paper which is not opaque. All lines and lettering shall be executed with Indian ink of good quality. Coloured lines and washes shall not be used. The lines and lettering shall be firm and even, and section lines shall not be closely drawn. The scale adopted shall be large enough to show the invention clearly.

(4) Drawings shall be delivered flat or rolled so as to be free from creases.

Opposition to grant or Amendment, etc.

14. Notice of opposition to the grant, or to the amendment, etc., of a patent shall be given in duplicate on Form 5. The duplicate notice shall be sent by the Controller to the applicant or his agent.

15. (1) Within 24 days of giving notice of opposition the opponent may, and shall, if at any time so required by the Controller, leave at the office a full written statement in duplicate of the reasons for, and extent of, his opposition, and of the grounds upon which he relies in support of his opposition.

(2) If the written statement referred to in clause (1) is supplied, the Controller shall furnish the applicant or his agent with the duplicate copy thereof, and the applicant or his agent may leave at the office a reply in writing within a time to be specified by the Controller. Such reply shall deal in full with the statement of the opponent and shall be in duplicate.

(3) If the reply referred to in clause (2) is supplied by the applicant, the Controller shall furnish the opponent or his agent with the duplicate copy thereof, and the opponent or his agent may again leave at the office a rejoinder in writing within a time to be specified by the Controller. Such rejoinder shall be confined strictly to matters in reply, and shall be in duplicate. The duplicate copy shall be sent by the Controller to the applicant or his agent.

(4) The Controller may require at any time that any written statement, reply or rejoinder shall be in the form of an affidavit.

(5) The time ordinarily allowed for filing a reply or rejoinder shall be one month.

16. (1) On completion of these proceedings, if any, or at such other time as he may see fit, the Controller shall appoint a time for the hearing of the case, and shall give the parties not less than ten days' notice of such appointment. If either party does not desire to be heard, he shall as soon as possible notify the Controller to that effect. If either party desires to be heard, he must leave a notice of his intention to attend the hearing on Form 6, together with a fee of Rs. 10 at the office. The Controller may refuse to hear any party who has not left such notice and fee at least two clear days before the date fixed for the hearing.

(2) After hearing the party or parties desirous of being heard or if neither party desires to be heard, then without a hearing, the Controller shall decide the case and notify his decision to the parties.

Sealing of Patents.

17. (1) If an applicant desires to have a patent sealed on his application, he shall within the period allowed by section 10, sub-section 2 of the Act, leave at the office an application on Form 7.

(2) Where the applicant neglects or fails to pay the fee prescribed within the time allowed, the time may be extended for a period not exceeding three months. An application for such extension of time shall be made on Form 4, and shall be accompanied by a fee of Rs. 10, Rs. 20 or Rs. 30 for an extension of one, two, or three months respectively.

18. The patent shall be in the form given in the third schedule to these rules, with such modifications as the circumstances of each case require.

Restoration of a Lapsed Patent.

19. (1) Application under section 16 of the Act for the restoration of a lapsed patent shall be made on Form 9.

(2) If the Controller entertains the application, he shall advertise it in the *Gazette of India*.

20. Notice of opposition to the restoration may be given on Form 5 within six weeks of the advertisement and the procedure for the disposal of such opposition shall be regulated by the provisions of Rules 14, 15 and 16.

Amendment.

21. A request under section 17 of the Act for the amendment of an application, specification or drawings (not being a request under section 62 of the Act for correction of a clerical error) shall be made on Form 10, and shall be accompanied by a copy of the application, specification, or drawings showing in red ink the proposed amendment in such a manner as to indicate clearly the alteration desired.

22. If the request relates to an application for a patent which has been accepted, the request and the nature of the proposed amendment shall be advertised by notification in the *Gazette of India* and in such other manner, if any, as the Controller may in each case direct under Rule 45. The Controller shall also notify all persons whose names are entered at the time of the request on the Register as claiming an interest in the patent.

23. Notice of opposition to the amendment may be given on Form 5 within three months of the date of the notification, and the procedure for the disposal of such opposition shall be regulated by the provisions of Rules 14, 15, and 16.

24. Notice of an offer under section 24 of the Act to surrender a patent shall be made on Form II. The Controller shall advertise the offer in the *Gazette of India*, and shall notify all persons whose names are entered at the time of the offer on the Register as claiming an interest in the patent.

25. Within six weeks of the advertisement any person may give notice of opposition to such surrender. After the expiration of such six weeks the Controller may, if a notice of opposition has been given, appoint a hearing if he sees fit, and shall decide whether the patent shall be revoked.

CHAPTER III.—DESIGNS.

26. (1) For the purposes of the registration of designs and of these rules, goods shall be classified in the manner specified in the fourth Schedule hereto.

(2) If any doubt arises as to the class to which any particular description of goods belongs, it shall be determined by the Controller.

27. An address for service in British India shall be given in all applications and other communications to the Controller in connection with designs. Unless such an address is given the Controller need not proceed with the examination of an application, nor send any notice that may be required by the Act or these rules.

Application to register a Design.

28. (1) An application under section 43 of the Act for the registration of a design shall be made on Form 14 and shall be accompanied by four copies of the design and shall be dated and signed by the applicant or his agent.

(2) The application shall state the class in which the design is to be registered and the article or articles to which the design is to be applied. Where it is desired to register the same design in more than one class, a separate application shall be made in each class.

(3) If so required by the Controller, the applicant shall state the purpose for which the article is used, and the material or predominating material of which the article is made, and shall give a brief statement of the novelty claimed for the design.

29. (1) The four copies of the design which in accordance with rule 28 must accompany the application shall be exactly similar drawings, photographs, tracings, or other representations of the design, or shall be specimens of the design.

(2) Each representation shall show the complete design and shall be on paper, or mounted on paper, of a size of 13 by 8 inches, and on one side only. Drawings or tracings shall be made in black ink.

(3) When the specimens are not, in the opinion of the Controller, suitable for record in the office, they shall be replaced by representations.

(4) If the Controller in any case so requires, he shall be supplied with one or more representations or specimens of the design in addition to those supplied with the application.

(5) Where words, letters, or numerals are not of the essence of the design, they shall be removed from the representations or specimens.

Procedure on receipt of application.

30. Upon receipt of an application for registration, the Controller shall consider it, and if he thinks there is no objection to the design being registered, he may accept it.

31. If after consideration of the application any objections appear to the Controller, a statement of these objections shall be sent to the applicant or his agent in writing and unless within one month the applicant or his agent applies for a hearing he shall be deemed to have withdrawn his application.

32. The decision of the Controller at such hearing as aforesaid shall be communicated to the applicant or his agent in writing, and if he objects to such decision, he may within one month, should he consider it necessary for the purpose of appeal, apply upon Form 15, requiring the Controller to state in writing the grounds of his decision and the materials used by him in arriving at the same.

33. Upon receipt of such form, the Controller shall send to the applicant or his agent such statement as aforesaid in writing and the date when such statement is sent shall be deemed to be the date of the Controller's decision for the purpose of appeal.
34. An application which, owing to any neglect or default of an applicant, has not been completed so as to enable registration to be effected within six months of the date of application, shall be deemed to be abandoned.
35. Application under section 47, sub-sections (2) and (3) of the Act for the extension of the period of copyright in registered designs may be made at any time not more than six months and not less than one month before the time of the expiry of the copyright. The application shall be made on Form 16.
36. Before delivery on sale of any articles to which a registered design has been applied the proprietor of such design shall cause each such article to be marked with the word REGISTERED or with the abbreviation REGD. or with the abbreviation R.D. as he may choose, and also (except in the case of articles to which have been applied designs registered in classes 9, 13, 14 and 15) with the number appearing on the certificate of registration.
37. Registered designs shall not, except as provided in section 50 of the Act, be open to inspection until five years after the date of application for registration.
38. A request for information under section 51 of the Act may be made on Form 18. If the number of the registered design is not known, two copies of the design, in respect of which inquiry is made, shall accompany the application.

CHAPTER IV.—GENERAL.

Registers of Patents and Designs.

39. Requests under section 63 of the Act to enter a claim to any interest in a patent or registered design shall be made on Form 21, accompanied by the document under which the claim is made, and an attested copy thereof. If, however, the document is a matter of record, an official or certified copy thereof may be produced unless the Controller otherwise directs.
40. Ten clear days' notice of every application to the Court under section 64 of the Act for rectification of the register shall be given to the Controller.

Appeals.

41. (1) An appeal to the Governor General in Council from the decision of the Controller shall be made on Form 24 and shall be left at the office in duplicate and shall show fully the reasons for appealing and the grounds on which objection is taken to the decision.
- (2) The Controller shall forward one copy to the Governor General in Council through the Secretary in the Department of Commerce and Industry, who shall notify the appellant of its receipt.

Conversion of exclusive privilege into a patent.

42. (1) A request under section 81 of the Act for the conversion of an exclusive privilege into a patent shall be made on Form 25, and shall be accompanied by the order under which the exclusive privilege was acquired.
- (2) The Controller shall advertise the request in the *Gazette of India*.
- (3) Notice of application to the conversion may be given on Form 5 within three months of the date of the first advertisement, and the procedure for the disposal of such opposition shall be regulated by the provision of Rules 14, 15 and 16.

Miscellaneous powers of the Controller.

43. Before exercising any discretionary power given to the Controller by the Act or these rules adversely to the applicant for a patent, or for amendment of an application or specification, the Controller shall (under section 67 of the Act) give notice to the applicant or his agent and shall if so required within one month of the date of such notice, appoint a date for a hearing in the matter and shall give ten days' notice thereof.

44. Whether an applicant or agent desires to be heard or not the Controller may at any time require him to submit a statement in writing within a time to be notified by the Controller, or to attend before him and make explanation with respect to such matters as the Controller may require.

45. Applications for extension of the term of a patent under section 15, or for amendment under section 17 shall, if so directed by the Controller, be advertised by the applicant in not less than two newspapers published in British India. Copies of the newspapers containing those advertisements shall be supplied to the Controller.

Advertisement of such application shall be made by the Controller by Notification in the *Gazette of India*.

46. Any document for the amending of which no special provision is made by the Act may be amended, and any irregularity in procedure which, in the opinion of the Controller, may be obviated without detriment to the interests of any person may be corrected if the Controller think fit, and upon such terms as he may direct.

47. The time prescribed by these rules for doing any act or taking any proceeding thereunder may be enlarged by the Controller, if he thinks fit and upon such terms as he may direct.

INDIAN PATENTS AND DESIGNS RULES.

SCHEDULES.

- I. Fees, section 57 and Rule 4.
- II. Forms, Rules 6.
- III. Model form of patent, section 12 and Rule 18.
- IV. Classification of goods for designs, sections and 43 (3) and 77 (1) (b) and Rule 26.

THE FIRST SCHEDULE.

(Vide Section 57 and rule 4.)

FEES.

| Number of entry. | On what payable. | Number of Form. | Proper Fee. | |
|------------------|--|-----------------|-------------|----|
| 1 | On application for a patent under section 3 | 1 or 2 | Rs. | A. |
| 2 | For extension of time to accept application under section 5 (4) | | 10 | 0 |
| 3 | On notice of opposition under section 9 (1) | 4 | 20 | 0 |
| 4 | On hearing by Controller under section 9 (2). By applicant and opponent respectively | 5 | 5 | 0 |
| 5 | Before sealing under section 10 (1) | 6 | 10 | 0 |
| 6 | On extension of time for sealing under section 10 (2) (a) | 7 | 30 | 0 |
| | One month | 4 | | |
| | | .. | 10 | 0 |

| Number of entry. | On what payable. | Number of Form. | Proper Fee. |
|------------------|---|-----------------|-------------|
| | | | Rs. A. |
| | Two months | .. | 20 0 |
| | Three month | .. | 30 0 |
| 7 | On certificate of renewal under section 14 | 8 | .. |
| | Before expiration of 4th year in respect of the 5th year | .. | 50 0 |
| | Before expiration of 5th year in respect of the 6th year | .. | 50 0 |
| | Before expiration of 6th year in respect of the 7th year | .. | 50 0 |
| | Before expiration of 7th year in respect of the 8th year | .. | 50 0 |
| | Before expiration of 8th year in respect of the 9th year | .. | 50 0 |
| | Before expiration of 9th year in respect of the 10th year | .. | 100 0 |
| | Before expiration of 10th year in respect of the 11th year | .. | 100 0 |
| | Before expiration of 11th year in respect of the 12th year | .. | 100 0 |
| | Before expiration of 12th year in respect of the 13th year | .. | 100 0 |
| | Before expiration of 13th year in respect of the 14th year | .. | 100 0 |
| | <i>Note.—The fees for two or more years may be paid in advance.</i> | | |
| 8 | On enlargement of time for payment of renewal fees under section 14 (2) .. | 4 | .. |
| | One month | .. | 10 0 |
| | Two months | .. | 20 0 |
| | Three months | .. | 30 0 |
| 9 | On petition for extension of term of patent under section 15 | .. | 50 0 |
| 10 | On certificate of renewal in respect of each year under section 15 | .. | 100 0 |
| 11 | On application for restoration of lapsed patent under section 16 | 9 | 100 0 |
| 12 | On opposition to restoration under section 16 | 5 | 5 0 |
| 13 | On hearing by Controller under section 16 By applicant and opponent, respectively | 6 | 10 0 |
| 14 | On application to amend under section 17 Before acceptance | 10 | .. |
| | After acceptance | .. | 10 0 |
| | | .. | 20 0 |
| 15 | On opposition to amendment under section 17 (3) | 5 | 5 0 |
| 16 | On hearing by Controller under section 17 (4). By applicant and opponent, respectively. | 6 | 10 0 |
| 17 | On petition for compulsory license or revocation under sections 22 and 23 | .. | 10 0 |
| 18 | On offer to surrender a patent under section 24 | 11 | 10 0 |
| 19 | For duplicate of a patent under section 39 | 12 | 10 0 |
| 20 | On notice to Controller of intended exhibition of an invention or design under section 40 or 52 | 13 | 5 0 |
| 21 | On request to register design under section 43 in classes 1 to 6 and class 16 .. | 14 | .. |
| | In classes 7 to 15 | .. | 3 0 |
| | | | 0 8 |

| Number of entry. | On what payable. | Number of Form. | Proper Fee. |
|------------------|---|-----------------|-------------|
| | | | Rs. A. |
| 22 | On request for written decision under Rule 32 | 15 | 5 0 |
| 23 | On request to extend copyright under section 47 | 16 | 10 0 |
| 24 | On request to inspect under section 50 | 17 | 1 0 |
| 25 | On request for information under section 51 | 18 | .. |
| | when number is given | .. | 2 0 |
| | when number is not given | .. | 4 0 |
| 26 | On inspection of the register under section 59 | .. | .. |
| 27 | On request for certificate under section 59 | 19 | 1 0 |
| | An additional fee of 4 annas for every 100 words in excess of 400 words will be charged. Drawings will be charged according to agreement. | | 2 0 |
| 28 | On request to correct or cancel entry in register under section 62 | 20 | 3 0 |
| 29 | On request to enter claim in register under section 63 | 21 | 5 0 |
| 30 | On request to alter address in register | 22 | 1 0 |
| 31 | On entry of order of Court under section 64 (4) | 23 | 3 0 |
| 32 | On appeal from the Controller to the Governor General in Council under section 70 | 24 | 30 0 |
| 33 | On application for a patent in place of an exclusive privilege under section 81 | 25 | 3 0 |
| 34 | On opposition to grant thereof under section 81 | 5 | 5 0 |
| 35 | On hearing by Controller under section 81 (3). By applicant and opponent, respectively | 6 | 10 0 |

THE SECOND SCHEDULE.

Forms.

List of Forms.

| Form No. | Act, Section. | Title. | Fee. |
|----------|-----------------------|---|------------|
| | | | Rs. |
| 1 | 3 | Application for patent | 10 |
| 2 | 3 | Do. do. | 10 |
| 3 | 4 | Specification | .. |
| 4 | 5 (4), 10 (2), 14 (2) | Application for extension of time | 10, 20, 30 |
| 5 | 9 (1), 16, 17, 81 | Notice of opposition | 5 |
| 6 | 9 (2), 16, 17, 81 | Notice of intention to attend hearing | 10 |
| 7 | 10 | Request for sealing | 30 |
| 8 | 14 | Request for certificate or renewal | 50 or 100 |
| 9 | 16 | Application for restoration of patent | 100 |
| 10 | 17 | Application to amend | 10 or 20 |
| 11 | 24 | Offer to surrender patent | 10 |
| 12 | 39 | Application for duplicate patent | 10 |
| 13 | 40 and 52 | Notice of intended exhibition | 5 |

| Form No. | Act, Section. | Title. | Fee. |
|----------|---|--|----------|
| | | <i>Designs.</i> | Rs. |
| 14 | 43 | Application for registration .. | Annas 8 |
| 15 | .. | Request for grounds of decision .. | or Rs 3. |
| 16 | 47 | Application for extension of copy-right | 5 |
| 17 | 50 | Request to inspect design .. | 10 |
| 18 | 51 | „ for information .. | 1 |
| | | | 2 or 4 |
| | | <i>General.</i> | |
| 19 | 59 | Request for certificate .. | 2 |
| 20 | 62 | „ to cancel or correct .. | 3 |
| 21 | 63 | „ for entry in register .. | 5 |
| 22 | 63 | „ for entry of address .. | 1 |
| 23 | 64 | Entry of order of Court .. | 3 |
| 24 | 5 (2), 9 (3), 16 (5), 17 (6), 43 (4), 70 | Appeal | 30 |
| 25 | 81 | Application for conversion of exclusive privilege .. | 3 |
| 26 | 76 | Power of authority to agent .. | .. |
| 27 | 76 | Statement of address .. | .. |

Form 1.

(Form to be used when the true and first inventor is sole or joint applicant)

INDIAN PATENTS AND DESIGNS ACT, 1911.

Application for Patent, Section 3.

To be accompanied by the specification on Form 3 in duplicate.

I (or we) I.....
do hereby declare:—

(i) that I am (or we are) in possession of an invention of which the title is 2.....

(ii) that I (or we) (or the said 3.. ..) claim to be the true and first inventor thereof;

(iii) That the invention is not in use by any other person;

(iv) that the specification filed with this application is, or any amended specification which may hereafter be filed in this behalf will be, true of the invention to which this application relates;

(v) that the facts and matters stated herein are true to the best of my (or our) knowledge, information and belief.

I (or we) humbly pray that a patent may be granted to me (or us) for the said invention.

Date and Sign. Dated this.....day of.....19.....
(Signed).....

To the

Controller of Patents,

1, Council House Street, Calcutta.

Form 2.

| |
|-------------|
| Fee Rs. 10. |
|-------------|

(Form to be used when the true and first inventor is not a party to the application.)

INDIAN PATENTS AND DESIGNS ACT, 1911.

Application for Patent, Section 3.

To be accompanied by the specification on form 3 in duplicate.

I (or we) 1.....
do hereby declare:—

(i) that I am (or we are) in possession of an invention of which the title is 2.....

(ii) that I (or we) (the said 3.....) claim to be the assign of (or the legal representatives of) 4.....

.....who claims and is believed to be true and first inventor thereof;

(iii) that the invention is not in use by any other person;

(iv) that the specification filed with this application is, or any amended specification which may hereafter be filed in this behalf will be, true of the invention to which this application relates;

(v) that the facts and matters stated herein are true to the best of my (or our) knowledge, information and belief.

I (or we) humbly pray that a patent may be granted to me (or us) for the said invention.

Date and sign. Dated this.....day of.....19.....

(Signed).....

To the

Controller of Patents,

1, Council House Street, Calcutta.

Note 1. If the inventor does not wish to be a party to the application, the applicant shall produce for inspection by the Controller the original deed of assignment or other document under which he is enabled to apply for a patent and shall supply a copy thereof to be retained by the Controller, unless the application itself is endorsed in the following form signed by the inventor.

I 5.....
referred to on the reverse of this document as claiming to be the true and agree that the said application shall be made without my name as an applicant for a patent.

Dated this.....day of.....19.....

(Signed).....

Signature of 2 witnesses.....

1. Insert name, calling and address.

2. Insert title.

3. Insert name.

4. Insert full name, address and calling of true and first inventor. See notes.

5. Insert full name, calling and address.

To the

Controller of Patents,

1, Council House Street, Calcutta.

Note 2. If the application is made by the legal representative of a deceased inventor, the legal representative shall produce for inspection the probate of the will or the letters of administration granted of the estate and effects of the inventor, or an official copy of such probate or letters, or such other evidence of his title as the Controller may require.

Form 3.

(To be supplied in duplicate with Form 1 or Form 2.)

INDIAN PATENTS AND DESIGNS ACT, 1911.

Specification, Section 4.

No fee.

1.....
.....
.....
2.....
.....

The following specification particularly describes and ascertains in the nature of the invention and the manner in which the same is to be performed :—

3.....
.....
.....
.....
.....
.....
.....
.....
.....
.....

The completion of the description should be followed by the words I (or we) claim :—After which should be written the claim or claims numbered consecutively. The specification and the duplicate thereof must be signed at the end and dated thus: Dated the.....day of.....19....

-
1. Insert title verbally agreeing with that in the application form.
 2. Insert name, calling and address of applicants as in application.
 3. Here begin full description of the invention. The continuation of the specification should be upon wide ruled paper of a size approximately of 13 inches by 8 inches, on one side only, with a margin of 1½ inches on the left hand part of the paper.

Note.—In the preparation of the claim or claims careful attention should be paid to the terms of Rule 11 of the Indian Patents and Designs Rules, 1912. Any unnecessary multiplicity of claims or prolixity of language should be avoided.

Form 4.

Fee Rs. 10, 20 or
30. See note below.

INDIAN PATENTS AND DESIGNS ACT, 1911.

Application for extension of time, sections 5, 10 or 14.

I (or we) 1.
do hereby apply for months' extension of time :—

- 2 (a) Under section 5 (4) for the acceptance of the application for a
patent No. of.
,, (b) Under section 10 (2) (d) for the sealing of a patent on applica-
tion No. of.
,, (c) Under section 14 (2) for payment of renewal fees on patent
No. of.

The reasons for making this application are as follows 3 :—

My (or our) address for service in British India is 4 :—

Date and sign.

Dated this day of 19....

Signed.....

To the

Controller of Patents,

1, Council House Street, Calcutta.

Note.—Time allowed and fees payable—

- (a) Three months Rs. 20.
(b) or (c) One month, Rs. 10; two months, Rs. 20; three months
Rs. 30.

Form 5.

Fee Rs. 5.

INDIAN PATENTS AND DESIGNS ACT, 1911.

Notice of opposition, sections 9, 16, 17 or 81.

(To be supplied in duplicate.)

1 (or we) 5.

-
1. Insert name, calling and address.
 2. *a, b, c*, strike out when not applicable. Quote number and year of application or patent.
 3. Insert reasons.
 4. Insert address.
 5. Insert name, calling and address.

do hereby give notice of my (or our) intention to oppose—

I (a) Under section 9, the grant of a patent.
 „ (b) Under section 16, the restoration of lapsed patent.
 „ (c) Under section 17, the amendment.
 „ (d) Under section 81, the conversion of exclusive privilege.
 upon application for patent No. 2.....of 19....entitled.....
 applied for by 3.....

The grounds of opposition are as follows 4 :—

I (or we) declare that the facts and matters stated herein are true to the best of my (or our) knowledge, information and belief.

My (or our) address for service in British India is 5 :—

Date and sign.

Dated this.....day of.....19.....

Signed.....

To the

Controller of Patents,

1, Council House Street, Calcutta.

Form 6.

Fee Rs. १०.

INDIAN PATENTS AND DESIGNS ACT, 1911.

Notice of intention to attend hearings of opposition, sections 9, 16, 17 and 81.

I (or we) 6.....
 hereby give notice that the hearing in reference to 7.....

will be attended by myself (or ourselves) or by some person on my (or our) behalf.

Date and sign.

Dated this.....day of.....19.....

(Signed).....

To the

Controller of Patents,

1, Council House Street, Calcutta.

Note:—The Controller may refuse to hear any party who has not left this notice and paid the prescribed fee at least two clear days before the date fixed for the hearing.

1. a, b, c, d, strike out when not applicable.
2. Insert number, date and title.
3. Insert name of person making application which is opposed.
4. Insert grounds.
5. Insert address.
6. Insert name, calling and address.
7. Insert particulars.

Form 7.

Fee Rs. 30.

INDIAN PATENTS AND DESIGNS ACT, 1911.

Request for sealing, section 10.

I (or we) 1.
 desire to have a patent sealed on my (or our) application 2 of.

 and request that the following address in British India may be entered on
 the Register as my (or our) address for service in British India 3.

Date and sign.

 Dated this.....day of.....19.....
 (Signed).....

To the

 Controller of Patents,
 1, Council House Street, Calcutta.

Note.—If a patent is to be sealed, so that rights may accrue under section 12 of the Act, this request, together with the fee of Rs. 30, must be received in the Patent Office before the expiration of 18 months from the date of the application or within such extended times as are allowed in section 10 (2). An extension of time not exceeding three months shall be allowed under section 10 (2) (d) on application being made on Patents Form No. 4 accompanied by the fee of Rs. 10 for one month, Rs. 20 for two months or Rs. 30 for three months.

Form 8.

Fee Rs. 50 or 100.

INDIAN PATENTS AND DESIGNS ACT, 1911.

Request for certificate of payment or renewal, section 14.

I (or we) transmit the fee of Rs. by 4. in payment of the
 renewal fee on patent No. of. granted to.

 and request that the usual certificate may be granted.

Dated this.....day of.....19.....

 Signature.....
 Address.....

To the

 Controller of Patents,
 1, Council House Street, Calcutta.

-
1. Insert name, calling and address.
 2. Insert number and date.
 3. Insert address for service.
 4. State whether cash, note, money order or postal order.

Form 9.

Fee Rs. 50 or
Rs. 100.

INDIAN PATENTS AND DESIGNS ACT, 1911.

Restoration of Patent, section 16.

I (or we) a.....
hereby apply for an order of the Controller for restoration of the patent No.
b.....of.....granted to.. ..

The circumstances which have led to the omission to pay the fee of Rs. c....
.....on or before the d..... day of.....as are follows e.....

I (or we) declare that the facts and matters stated herein are true to the
best of my (or our) knowledge, information and belief.

My (or our) address for service in British India is f.....

Date and sign.

Dated this.....day of.....19....

(Signed).....

To the

Controller of Patents,

1, Council House Street, Calcutta.

Form 10.

Fee Rs. 10 before
acceptance, Rs. 20
after acceptance.

INDIAN PATENTS AND DESIGNS ACT, 1911.

Amendment, section 17.

I (or we) a.....
.....
seek leave to amend the g.....

-
- a. Insert name, calling and address.
 - b. Insert number and date.
 - c. Insert amount.
 - d. State last date when fee was due.
 - e. The circumstances must be stated in detail.
 - f. Insert address for service.
 - g. State whether application, specification or drawings.

.....of application for patent No. a.....dated.....
as shown in red ink in the copy b hereunto annexed.

c I (or we) declare that no suit for infringement or proceedings before a Court for revocation of the Patent in question is pending.

My (or our) reasons for making this amendment are as follows d.....

I (or we) declare that the facts and matters stated herein are true to the best of my (or our) knowledge, information and belief.

My (or our) address for service in British India is e

Date and sign.

Dated this.....day of.....19.....

(Signed).....

To the

Controller of Patents.

1, Council House Street, Calcutta.

Form II.

Fee Rs. 10.

INDIAN PATENTS AND DESIGNS ACT, 1911.

(Surrender of Patent, section 24.)

I (or we) f.. ..

hereby offer to surrender the Patent No. a.....
 dated.....granted to.....

No suit for infringement or proceedings for revocation of the patent is pending. My (or our) reasons for making this offer are as follows d.....

I (or we) declare that the facts and matters stated herein are true to the best of my (or our) knowledge, information and belief.

My (or our) address for service in British India is e:—

Date and sign. Dated this.....day of.....19.....

(Signed).....

To the

Controller of Patents,

1, Council House Street, Calcutta.

a. Insert number and date.

b. If the specification has been printed, an officially printed copy shall be used.

c. Strike out this paragraph if a patent has not been sealed.

d. Insert reasons.

e. Insert address.

f. Insert name, calling and address.

Form 12.

Fee Rs. 10.

INDIAN PATENTS AND DESIGNS ACT, 1911.

(Application for Duplicate Patent, section 39.)

I (or we) a.....
 regret to have to inform you that the Patent No. b..
 dated
 granted to.....c..
 has been d.....

I (or we) declare that the facts and matters stated herein are true to the best of my (or our) knowledge, information and belief.

I (or we) beg therefore to apply for the issue of a duplicate of such patent.

Dated this.....day of.....19.....

(Signed).....

To the

Controller of Patents,

1, Council House Street, Calcutta.

Form 13.

Fee Rs. 5.

INDIAN PATENTS AND DESIGNS ACT, 1911.

(Notice of Intended Exhibition, section 40 and section 52.)

I (or we) a.....
 hereby give notice that I (or we) intend to exhibit my (or our) invention (or design) e.....

-
- a. Insert name, calling and address.
 - b. Insert number and date.
 - c. Insert name of original grantee.
 - d. Insert the word "lost" or "destroyed" as the case may be and state fully the circumstances. Also state the interest possessed by the applicant in the patent.
 - e. Insert short description of invention or design.

.....at the a.....exhibition certified or notified by
Act, 1911, as an international or industrial exhibition.

Date and sign. Dated this.....day of.....19.....

(Signed).....

To the

Controller of Patents,

1, Council House Street, Calcutta.

Form 14.

Fee Annas 8 or
Rs. 3 according
to classification.

INDIAN PATENTS AND DESIGNS ACT, 1911.

(Application for Registration of Design, section 43.)

You are requested to register the accompanying design in Class No. b..
.....in the name of c.....
who claims to be the proprietor thereof.

Four exactly similar d.....of the design accompany this request.

The design is to be applied to e.....Address for service in
British India is f.....

Date and sign. Dated this.....day of.....19.....

(Signed).....

To the

Controller of Designs,

1, Council House Street, Calcutta.

Note.—Trade or property marks are not registered under the Patents
and Designs Act, 1911.

Form 15.

Fee Rs. 5.

INDIAN PATENTS AND DESIGNS ACT, 1911.

(Request Under Rule 32.)

Application for design No.....
Class

-
- a. Insert name.
 - b. Insert number of class.
 - c. Insert name, calling and address.
 - d. State whether drawings, photographs, tracings, or specimens.
 - e. Insert name of article or articles to which design is to be applied.
 - f. Unless an address for service in British India is given, the request
will not be considered.

You are hereby requested under Rule 32 of the Patents and Designs Rules to state in writing the grounds of your decision and the materials used by you in arriving at such decision.

Address for service in British India is:

Dated this.....day of.....19.....

(Signed).....

To the

Controller of Patents,

1, Council House Street, Calcutta.

Form 16.

| |
|--------------------|
| <p>Fee Rs. 10.</p> |
|--------------------|

INDIAN PATENTS AND DESIGNS ACT, 1911.

(Application to extend Copyright, section 47.)

You are requested by the undersigned who is the registered proprietor of the Design No.....registered in class.....to extend the period of copyright for a period of five years.

Address for service in British India is:.....

Dated this.....day of.....19.....

(Signed).....

To the

Controller of Patents,

1, Council House Street, Calcutta.

Form 17.

| |
|-------------------|
| <p>Fee Re. 1.</p> |
|-------------------|

INDIAN PATENTS AND DESIGNS ACT, 1911.

(Inspection of Design, section 50.)

You are requested by the undersigned who is the registered proprietor of the design No. a.....registered in Class No.....to allow him or his

a. Insert number and class.

nominee a
to inspect the design.

Dated this.....day of.....19.....

Signed.....

Address.....

Signature of nominee.....

To the

Controller of Designs,

1, Council House Street, Calcutta.

Form 18.

Fee Rs. 2 or 4.

INDIAN PATENTS AND DESIGNS ACT, 1911.

(Request for information, section 51.)

You are requested to give to the undersigned such information as he may be entitled to under section 51 of the Act in respect of the design

No.....

Address for service is.....

Dated this.....day of.....19.....

(Signed).....

To the

Controller of Designs,

1, Council House Street, Calcutta.

Note.—If the number cannot be given and information is required regarding a design, two samples of the design may be attached to this form which must then be accompanied by a fee of Rs. 4.

Form 19.

Fee Rs. 2. See
foot-note.

INDIAN PATENTS AND DESIGNS ACT, 1911.

(Request for Certificate, section 59.)

In the matter of { Patent No. b.....of.....
 { Design No.....class.....

-
- a. Insert name of nominee who must also sign the application.
b. Insert number and date.

I (or we) a.....

 hereby request you to furnish me (or us) with your certificate to the
 effect that b.....

 and to send the certificate to c.....

Dated this.....day of.....19.....

(Signed).....

To the

Controller of Patents and Designs,
 1, Council House Street, Calcutta.

Note.—An extra charge of annas four will be charged for every 100 words in excess of 400. The certificate will not be supplied until the charge is paid.

Form 20.

Fee Rs. 3.

INDIAN PATENTS AND DESIGNS ACT, 1911.

(Request for correction or cancellation, section 62 of Act.)

In the matter of { Patent No. d.....of.....
 { Design No.....class.....

I (or we) a.....

.....
 hereby request you under the power given by section 62 of the Indian
 Patents and Designs Act, 1911, to e.....

My (or our) address for service in British India is a :.....

Date and sign.

Dated this.....day of.....19.....

To the

(Signed).....

Controller of Patents and Designs,
 1, Council House Street, Calcutta.

-
- a. Insert name, calling and address.
 - b. Here set out the particulars which the Controller is requested to certify.
 - c. Insert name and address. Date and sign.
 - d. Insert number and date.
 - e. Insert particulars.

Form 21.

| |
|------------|
| Fee Rs. 5. |
|------------|

INDIAN PATENTS AND DESIGNS ACT, 1911.

(Request for Entry in Register, section 63.)

In the matter of { Patent No. **b**.....of.....
Design No.....class.....I (or we) **c**.....
claim to be entitled by (or as) **d**.....
to the following interest **e**....{ **f** in the Patent No.....of.....
in the registered design No.....class,
granted to **g**.....in proof whereof I (or we) transmit the accompanying **h**.....
together with an attested copy thereof and I (or we) request that an entry
may be made in the Register.My (or our) address for service in British India is **a** :.....Date and sign. Dated this.....day of.....19.....
(Signed).....

To the

Controller of Patents and Designs,
1, Council House Street, Calcutta.

-
- a.** Insert address.
b. Insert number and date.
c. Insert name, calling and address.
d. Insert ground of claim whether by assignment, transmission, etc.,
or as mortgagee, licensee or otherwise.
e. Insert nature of interest.
f. Insert nature and date of patent, or number and class of the regis-
tered design.
g. Insert name.
h. Insert nature of document.

Form 22.

| |
|------------|
| Fee Re. 1. |
|------------|

INDIAN PATENTS AND DESIGNS ACT, 1911.

(Entry of Alteration of Address)

In the matter of { Patent No. of
 { Design No. class.

I (or we) a.

.....
 hereby request that the following address in British India may be entered in the Register, viz. b.
 and request that the existing address which is as follows may be cancelled c.

Date and sign. Dated this. day of. 19.

(Signed).....

To the

Controller of Patents and Designs,
 1, Council House Street, Calcutta.

Note — This form may only be used for a request to correct a name or alter an address upon the Register. It may not be used as a request to register any change of interest in a patent or registered design.

Form 23.

| |
|------------|
| Fee Rs. 3. |
|------------|

INDIAN PATENTS AND DESIGNS ACT, 1911.

(Entry of Order of Court, section 64.)

I (or we) a.
 hereby transmit an office copy of an order of the Court with reference to d.

 and request that the register may be rectified.

Date and sign. Dated this. day of. 19.

(Signed).....

To the

Controller of Patents and Designs,
 1, Council House Street, Calcutta.

-
- a. Insert name, calling and address.
 b. Insert address to be entered
 c. Insert address to be cancelled.
 d. Insert purport of order.

Form 24.

Fee Rs. 30.

INDIAN PATENTS AND DESIGNS ACT, 1911.

(Appeal to Governor-General in Council under sections 5, 9, 16, 17, 43 or 70)

I (or we) a.....
 hereby appeal to the Governor-General in Council from the decision (or that
 part of the decision) b of the Controller, dated the c.....day of.....
 ...19.....whereby he—

- (a) refused to accept an application for a patent under section 5 ;
- (b) required an amendment under section 5 ;
- (c) decided an opposition under section 9 ;
- (d) restored a lapsed patent under section 16 ;
- d (e) refused to restore a lapsed patent under section 16 ,
- (f) allowed an amendment under section 17 ;
- (g) refused to allow an amendment under section 17 ;
- (h) refused to register a design under section 43.

The reasons for appealing, and the full statement of the grounds upon
 which I (or we) rely for objecting to the decision, are as follows e :—

Note.—This form in duplicate should be sent to the Controller of Patents
 and Designs, 1, Council House Street, Calcutta, who will proceed under
 Rule 41.

Form 25.

| |
|------------|
| Fee Rs. 3. |
|------------|

INDIAN PATENTS AND DESIGNS ACT, 1911.

(Application for conversion of exclusive privilege, section 81.)

*(To be accompanied by the order under which the exclusive privilege
 was obtained.)*

I (or we) a.....
 do hereby declare:—

- a. Insert name, calling and address.
- b. Strike out if not applicable.
- c. Insert date of decision. The appeal must be made within two months
 of that date.
- d. Strike out parts not applicable.
- e. State fully, continuing on further sheets and on one side only. The
 last page must be dated and signed.

(i) that I am (or we are) in possession under the Inventions and Designs Act, 1888, of an exclusive privilege registered as No. a.....ofand obtained by.....

(ii) that no other person has any share or interest in the said exclusive privilege b

(iii) that the facts and the matters stated herein are true to the best of my (or our) knowledge, information and belief.

I (or we) pray that a patent under the Indian Patents and Designs Act, 1911, may be granted to me (or us) in substitution for, and bearing the same date as, the said exclusive privilege.

Date and sign. Dated this.....day of.....19....

(Signed).....

To the

Controller of Patents and Designs,
1, Council House Street, Calcutta.

Note.—If any person has any share or interest in the exclusive privilege, his consent in writing should be obtained and forwarded with his application

Form 26.

Stamp to be
attached, see
foot-note.

INDIAN PATENTS AND DESIGNS ACT, 1911.

(Power of Authority to Agent.)

In connection with c.....

I (or we), the undersigned hereby authorise d.....

of.....
to act as my Agent b and to receive all notices, requisitions and communications until further notice

e And I (or we) revoke the previous authority given by me (or us) to f..
.....
in this matter

g Dated this.....day of.....19.....

Signature.....

Address.....

To the

Controller of Patents and Designs,
1, Council House Street, Calcutta.

Note — This form is liable to stamp duty under the Indian Stamp Act, II of 1889. When power is given to one or more persons as Agents to act in

- a. Insert number and date. b. See footnote.
c. State particulars. d. Insert name and address of Agent.
e. Cancel if not required.
f. Insert name of Agent whose authority is cancelled.
g. Insert date, signature and address.

a single transaction, it will be sufficient if the form bears a special adhesive label of the value of one rupee only. When power is given to not more than five persons to act jointly and severally in more than one transaction, or generally in respect of several patents or designs applications, then a special adhesive label of five rupees value should be affixed.

Form 27.

INDIAN PATENTS AND DESIGNS ACT, 1911.

(Statement of Address.)

In connection with a

I (or we) the undersigned request that until further notice all notices, requisitions, &c., may be sent to b.....at.....

Date and sign. Dated this.....day of.....19.....

Signature.....

To the

Controller of Patents and designs,
1, Council House Street, Calcutta.

THE THIRD SCHEDULE.

(Model Form of Patent.)

Government of India.

Patent.

No.....of.....19.....

Whereas A. B. of.....hath declared that he is in possession of an invention for.....(quote title).....and that he is the true and first inventor thereof (or the legal representative or assignee of the true and first inventor) and that the same is not in use by any other person to the best of his knowledge, information and belief.

And whereas he hath humbly prayed that a patent might be granted to him for the said invention.

And whereas he hath by his specification (of which a copy is hereunto annexed) particularly described and ascertained the nature of the invention and the manner in which the same is to be performed.

The Governor-General in Council is pleased to order by these presents that the above said petitioner (including his legal representatives and assignees or any of them) shall, subject to the provisions of the Indian Patents and Designs Act, 1911, as patentee have the exclusive privilege of making, selling and using the invention throughout British India (including British Baluchistan and the Santhal Parganas) and of authorizing others so to do for the term of 14 years from the.....day of.....19.....subject to the condition that the validity of this patent is not guaranteed by Government c (and that Government shall have the right to use the invention either without payment or on such terms as it may consider reasonable) and also provided that the fees prescribed for the continuation of this patent are duly paid.

In witness whereof the Governor-General in Council has caused this patent to be sealed as of the.....day of.....19.....

Signature of Controller.....

Date of sealing.....

- a. State particulars.
- b. Insert name and address.
- c. For Government servant only.

Note.—Renewal fees will be due on this patent, if it is to be continued, on the.....day of.....19.....and on the same day in each year thereafter.

THE FOURTH SCHEDULE.

(Classification of Goods.)

Class 1.—Articles composed wholly of metal or in which metal predominates not included in Class 2.

Class 2.—Jewellery.

Class 3.—Articles composed wholly of wood, bone, ivory, papiermache, or other solid substances not included in other classes, or of materials in which, such substances predominate.

Class 4.—Articles composed wholly of glass, earthenware, or porcelain, bricks, tiles, or cement, or in which such materials predominate.

Class 5.—Articles composed wholly of paper, (except paper hangings), card-board, mill-board or straw-board, or in which such materials predominate.

Class 6.—Articles composed wholly of leather or in which leather predominates, and bookbinding of all materials.

Class 7.—Paper hangings.

Class 8.—Carpets and rugs in all materials, floorcloths, and oil cloths.

Class 9.—Lace.

Class 10.—Hosiery.

Class 11.—Millinery and wearing apparel, including boots and shoes.

Class 12.—Ornamental needlework on muslin or other textile fabrics.

Class 13.—Printed or woven designs on textile piece-goods (other than checks or stripes).

Class 14.—Printed or woven designs on handkerchiefs and shawls (other than checks or stripes).

Class 15.—Printed or woven designs (on textile piece-goods or on handkerchiefs or shawls) being checks or stripes

Class 16.—Goods not included in other classes.

NOTICES.

THE PATENT OFFICE.

1, Council House Street, Calcutta.

Public room open, 11 A.M., to 4 P.M., Saturdays 11 A.M. to 1 P.M.

1. *All communications* relating to applications for leave to file specifications and for registration of designs under the Inventions and Designs Act (V of 1888), or in continuation of such applications, should be addressed to the Patents Secretary, 1, Council House Street, Calcutta. Documents sent by post should be carefully packed.

2. *Directions* for the guidance of inventors and others are given in the Act Manual (Price Re. 1 or rs. 6d.)

3. *Fees* payable under the fourth and sixth schedules are payable in cash and must be received in the office within the times allowed by the Act. When cheques are offered in payment of fees, it must be clearly understood that the office cannot hold itself responsible for any delay that may occur in the collection of cash on the cheques; any cheque not payable in Calcutta is subject to commission. In cases where it is not possible to have the fees handed in at the Patent Office, it would be preferable to have them sent by money order payable at Calcutta to the Patent's Secretary.

4. *Trade marks* are not registered and *medicines* are not patented under the Inventions and Designs Act.

5. *Applications* made under the Act are placed for inspection in the public room for ten days from the date of the *Gazette of India* in which their filing has been notified.

6. *Specifications* of inventions which have been notified as filed in the *Gazette of India* may be inspected on payment of a fee of one rupee at—

Calcutta—Patent Office, 1, Council House Street.

Madras—Record Office, Egmore.

Bombay—Record Office.

Rangoon—Office of the Revenue Secretary to the Government

Cawnpore—Office of the Director of Industries, United Provinces.

7. *Publications on sale at the Patent Office :—*

| | Price |
|--|-------|
| | RS A |
| (a) Act Manual, comprising the Inventions and Designs Act (V of 1888) and an explanatory memorandum and directions for the guidance of parties applying for the protection of inventions or designs .. | 1 0 |
| (b) The Indian Patents and Designs Act 1911 (II of 1911) .. | 0 1 0 |
| (c) Weekly Notifications (extract from the <i>Gazette of India</i>) .. | 0 1 |
| Annual subscription with postage .. | 3 |
| (d) Inventions (consolidated subject-matter index, 1900—1908, and chronological list 1900-1904 .. | 2 0 |
| (e) Inventions and Designs. Annual indexes for the years 1905, 1906, 1907, 1908, 1909, 1910 .. | 1 0 |
| each .. | 1 0 |
| (f) Quarterly index, January to March and April to June, 1911 .. | 0 0 |

H. G. GRAVES,

Secretary under the Inventions and Designs Act, V of 1888

LECTURE VI.

THE LAW OF COPYRIGHT.

The word copyright now stands for a comprehensive class of rights in respect of literary, dramatic, musical and artistic work. It will be my endeavour to explain in due course the exact character and extent of this right. But in doing so it will be necessary to discuss in brief the stages of development of this right in English jurisprudence.

Copyright—what it denotes.

In its earliest signification copyright was regarded as 'literary property.' I shall confine myself for the present to this so-called property in literary and dramatic productions only, as distinguished from property in musical and artistic productions. Everyone, it is said, should enjoy the reward of his labour. What a man has sown he should be entitled to reap. This stands to reason, and it can scarcely be doubted that literary labour, from which the most extensive and far-reaching benefit accrues to mankind, should also confer upon the labourer a similar right to enjoy the fruits of his labour. The right so to enjoy may be called literary property.

'Literary property.'

The question is how and when the right arises and whether the character of the right is such as to bring it within the denomination of property. The original ideas that spring up in the fertile brain of the poet or the philosopher are clearly beyond the reach of the law of property. Such ideas must be bodied forth in language and impressed on paper, marble, metal or any other substance so as to assume physical existence, before it can come within the reach of any law. "The poet's eye in fine frenzy rolling" may "glance from heaven to earth and from earth to heaven," but until his imagination bodies forth the forms of things unknown, such things do not come within the scope and cognisance of the practical lawyer. It is only when the incorporeal ideas of the author have assumed corporeal existence that a certain right called 'copyright' comes into

Copyright before
publication and
Copyright after
publication.

existence which is exercisable by the author as against the whole world.

Copyright in fact includes two rights which are entirely distinct in their origin, nature and extent. The frequent application of the term to these two rights indiscriminately has often tended to create a good deal of confusion. One of them has been called 'copyright before publication.' It is the exclusive privilege of *first publishing* any original and material product of intellectual labour. The other is 'copyright after publication' by which is meant the exclusive privilege on the part of the author of printing or otherwise *multiplying copies* of any intellectual production after it has once been published to the world.¹ Both these rights when analysed reveal two fundamental factors. The one is positive and the other is negative, viz. first, the positive right in the author either to publish his intellectual production to the world (copyright before publication) or to republish or multiply copies thereof after first publication (copyright after publication), secondly, the negative right to exclude any one else from doing so.² Are not these two factors the essentials of property? Thus these two rights in their exercise resemble in a striking manner the right of property.³ And yet there is no doubt that literary property is essentially different from property in substantial and corporeal

¹ This distinction has no significance, so far as legal effect goes, since the Act of 1911 (1 & 2 Geo. v. C. 46, the bulk of which is incorporated into the Indian Copyright Act, Act III of 1914, as the First Schedule thereof) which has put both kinds of copyright on the same footing. But it is useful for the purpose of understanding the different rights which emerge under two different sets of circumstances.

² Cf. *per* Yates J. in *Millar v. Taylor* 4 Burr. 2356 :

"The value with respect to the author depends upon his right to the sole and perpetual publication of them; and the great point in question is 'whether he is entitled to that right or not.' But laying this observation aside, mere value (all may see) will not describe the property in this. The air, the light, the sun are of value inestimable; but who can claim a property in them? Mere value does not constitute property. Property must be somewhat exclusive of the claim of another."

³ Cf. Prof. Maitland who while discussing the right of the *Cestui qui trusts* observes: The new class of right is made to look as much like rights *in rem* (estates in land) as the Chancellor can make them look—Thus we get a conversion of the use into an incorporeal thing—in which estates and interests exists—a sort of immaterialised piece of land. *This is a perfectly legitimate process of thing-making and one that is always going on.* For an old example you may take the advowson; new examples are patent right, and copyright. Good will is now in the very process. 'Equity and the forms of Action at Common Law, p. 31.

objects. Suppose some one chooses to take away the manuscript of a book which I have kept in my drawer. He offends against my undoubted right of property thereto, and he is liable to an action, or prosecution, as the case may be. But he does not encroach upon my literary property in respect of the book unless and until he publishes to the world the sentiments contained therein and substantially in the language in which they have been embodied by me. This difference has led some to apply the term property to the former class of rights and deny it to the latter. You will observe that that is rather a narrow view of property. But whether copyright can properly come under the denomination of property or whether it must remain *sui generis*, whether it is capable of being labelled as a property right or not, it is clear that an author's copyright is a right sufficiently definite, sufficiently well-grounded in sound reason and general utility to society and, therefore, fit to be upheld by law. Listen to what Blackstone says of this right, "When a man by the exertion of his rational powers has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it appears to be an invasion of that right. Now the identity of a literary composition consists entirely in the sentiment and the language; the same conceptions clothed in the same words, must necessarily be the same composition; and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is exhibited; and no other man (it hath been thought) can have a right to exhibit it especially for profit, without the author's consent."¹

I have already said that no such property can be said to exist in incorporeal ideas until they are embodied. This proposition was definitely laid down in the case of *Abernethy v. Hutchinson*.² Mr. Aber-

Incorporeal ideas must assume corporeal existence before literary property can come into existence.

¹ Blackstone Vol. II, pp. 406-7.

² I. H. & Tw. 28 at p. 39; (1825) 3 L.J. Ch. 209; 47 Eng. Rep. 1313 at p. 1317 see also *Morrison v. Moat* 9 Hare 257; s.c. 68 Eng. Rep. 499 and *Caird v. Sims* L.R. 12 A.C. 326 where it is referred to and discussed.

nethy, an eminent surgeon filed a bill in Equity to restrain the publication of certain lectures delivered orally by him to medical students at St. Bartholomew's Hospital. He was unable to swear that the whole lecture had been reduced to writing at the date of its delivery. Lord Eldon in discussing the propriety of granting an injunction on the ground of copyright, observed, "where the lecture is orally delivered, it is difficult to say that an injunction can be granted upon the same principle upon which literary composition is protected, because the court must be satisfied that the publication complained of is an invasion of the work and this can only be done by comparing the composition with the piracy." In other words, the incorporeal ideas of the lecturer had not assumed corporeal existence before the lecture was delivered, and, therefore, no invasion of literary property could be proved. It must, however, be noted that an injunction was granted on a second argument and on the ground of breach of an implied contract between the lecturer and his pupils, *viz.* that the latter are not to carry into print the lecture notes taken by them either for their own profit or for the profit of others.

The same principle applies to musical and artistic production.

What applies to literary and dramatic productions applies with equal force to musical and artistic productions. The beautiful figures that the creative fancy of a Raphael, a Titian or a Michael Angelo offers to the world do indeed exist in idea long before they are thrown on canvas or carved on marble. They exist in their fancy in all the vividness of reality. But they are beyond the reach of the law of copyright until they find objective manifestation and are vested with corporeal existence. So with the immortal compositions of Beethoven or of Handel. They were there even before they were sung or played or could be published to the wondering world as 'Music.' It is only when some sort of material—be it paper, canvas, wax or marble—has embodied the ideas of the artist that, indirectly through that material, the ideas can come within the operation of copyright law.

As to literary productions.

Now suppose the author has already embodied his ideas in writing but has not as yet committed it to the public or has committed it only to a restricted circle of his friends and admirers, or say, to his pupils

or disciples. Here arises what I have described above as copyright-before-publication. The author has the exclusive right to the first publication of his manuscript. "Ideas," says Mr. Justice Yates in the famous case of *Millar v. Taylor*,¹ "are free. But while the author confines them to his study they are like birds in a cage, which none but he can have a right to let fly; for till he thinks proper to emancipate them they are under his own dominion. It is certain every man has a right to keep his own sentiments, if he pleases; he has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends. In that state the manuscript is, in every sense, his peculiar property, and no man can take it from him or make any use of it which he has not authorised without being guilty of a violation of his property. And as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication; and whoever deprives him of that priority is guilty of a manifest wrong, and the court have a right to stop it."²

Early decisions on the law as to copyright-before-publication³ are few and far between. Besides, in many of the reported cases there is to be found an element of fraud or breach of contract which obviously is not essential to the violation of the right now under discussion. The earliest case appears to be one of 1732—the case of *Webb v. Rose*.⁴ In that case a conveyancer's clerk threatened to publish as legal prece-

Early decisions on
copyright-before-
publication.

¹ (1769) 4 Burr 2378 s.c. 98 Eng. Rep. 201 at p. 242.

² So Aston J. in the same case observes: "The present claim is founded on the original right to this work, as being the mental labour of the author; and that the effect and produce of the labour is his. It is a personal incorporeal property, saleable and profitable; it has *indicia certa*: for, though the sentiments and doctrines may be called ideal, yet when the same are communicated to the sight and understanding of every man by the medium of printing, the work becomes a distinguishable subject of property and not totally destitute of corporeal qualities." 4 Burr, p. 2341.

³ Formerly, the distinction between copyright-before-publication and copyright-after-publication was a necessary one inasmuch as the one was governed by the common law and the other by statute. Cases under the two heads used accordingly to be treated separately. At present, the distinction has no legal significance, because both are governed by statute. For the sake of convenience, the cases relating to copyright-before-publication have been separately grouped together in this chapter, for although there is no distinction in the eye of law, there is a difference between the two and it is conducive to clearness of thought to recognise the difference

⁴ Cited 4 Burr. 2330.

dent his master's conveyancing drafts, without having previously obtained his master's permission for such publication. A suit was brought by the son and devisee of Mr. Webb and an injunction was granted by Sir Joseph Jekyll, M.R. restraining the defendant from publishing the drafts. In 1741, a similar injunction was granted in the case of *Forrester v. Walker*¹ against printing the plaintiff's notes of cases "gotten surreptitiously," without his consent. Another interesting case is mentioned by Sir S. Romilly.² Dr. Paley the famous divine and theologian had left certain manuscripts to be available for use to his parishioners only. A bookseller managed to get possession of them and threatened to publish them. He was, however, restrained by injunction from publishing. In the case of *Macklin v. Richardson*³ the subject of the copyright claimed was Macklin's celebrated farce called "Love a la mode." The play had been publicly acted by permission of the plaintiff. The defendant employed a shorthand writer who took down the words as the players uttered them in the course of the performance. Thereafter, the defendant corrected the shorthand notes from memory, published the first Act in a magazine and threatened to publish the second Act in the next number of the same magazine. The plaintiff prayed for an injunction. It appeared that there was a printed or written copy of the work. But it had not been published by the author to the world at large; it had only been lent by the author to the prompter during and for the purpose of each performance. It was contended by the defendant that the representation of the farce on the stage was a publication by the author so that he was thereby stopped from objecting to its being dealt with in a different manner *viz.* by printing and selling it. The argument, in other words, was that once you published the play in one form, it had become public property, and you could not object to its being dealt with by any member of the public in some other form. The Court, however, negatived the plea and granted an injunction, Lord

¹ *Ibid.*

² See 2 V. and B. 23 ; s.c. 35 Eng. Rep. 227.

³ Ambl. 694 ; 27 Eng. Rep. 451.

Commissioner Smythe observing "It has been argued to be a publication by being acted, and, therefore, the printing is no injury to the plaintiff; but that is a mistake, for besides the advantage from the performance, the author has no other means of profit, from the printing and publishing, and there is as much reason that he should be protected in that right as any other author."¹

The leading case on the subject of copyright-before-publication is that of *Prince Albert v. Strange and others*.² The facts of that case briefly stated are these: Her Majesty Queen Victoria and His Royal Highness Prince Albert had occasionally, for their amusement, made drawings and etchings, being principally on subjects of private and domestic interest to themselves. Amongst the etchings were private portraits of the plaintiff, the Prince of Wales, the Princess Royal and other members of the Royal family and personal friends of Her Majesty, portraits of favourite dogs of the Royal family, taken from life, etc.; there were also etchings from old and rare engravings in the possession of the Queen. Of these etchings they had made impressions for their own use, and not for publication. Such impressions had been partly made, for greater privacy, by means of a private press kept for that purpose, and partly by employing a printer in the country. The plates, however, were kept in the exclusive custody of the Queen or her Consort, except while temporarily with the printer above mentioned. Copies of the impressions were placed in several of the private apartments of the Queen at Windsor and in such apartments only, and a few had occasionally, but not frequently, been given to some of the personal friends of the Queen and the Prince. It so happened that some of the impressions had been surreptitiously retained by one of the pressmen employed and from

P. Albert v.
Strange and others
(1848).

¹ See also the case of *Morris v. Kelly* (1820). 1 Jac. & W. 481 (s.c. 37 Eng. Rep. 451) where Lord Eldon, C. granted an injunction against the performance of O'keefe's Comedy of the "Young Quaker" at the English Opera for the benefit of Maria Kelly. It seems, however, that the manuscript of the "Young Quaker" had already been published.

² *Prince Albert v. Strange and others: Attorney General v. Strange and others* (1848) 2 De. Gex. & Sm. p. 652; S.C. 64 Eng. Rep. 293, on appeal I.H. & Tw. 1, S.C. 47 Eng. Rep. 1302; M. & Gor. 25; S.C. 41 Eng. Rep. 1171

him through one Mr Judge, they had passed into the possession of the defendant, a London publisher. The defendant declared his intention of publicly exhibiting the impressions so obtained and also of selling to the public a descriptive catalogue of the lithographs. A bill was thereupon filed in the Court of Chancery by the Prince praying for delivery up to the plaintiff of the impressions surreptitiously taken, an injunction against any exhibition, engraving, copying, publication or any other dealing with the same, or any sale or publication of the catalogue, also for delivery up to the Prince of all copies of the catalogue then in the defendant's possession. Sir J. L. K. Bruce, V.C., granted an interim injunction in terms of the plaintiff's prayer; and the injunction was subsequently extended to Judge. The defendant moved to dissolve the injunction in so far as it restrained the publication of the descriptive catalogue. It was contended on his behalf that his conduct at most amounted to a breach of manners, but did not amount to the infringement of a right cognisable by law. The Vice-Chancellor held that the act of the defendant Strange amounted to an unlawful interference with another's property and that the means of composing and forming the catalogue had been "obtained unduly, i.e. without the consent of the plaintiff, without that of his Consort and without any right, moral, equitable, or legal."¹ He accordingly refused the motion. On appeal, his judgment was affirmed by Lord Cottenham, C., who characterised the act of the defendant Strange as an interference with the Prince's property. He, however, added that the case did not depend solely upon property, because according to the evidence before him the possession of the defendant Strange must have originated in a breach of confidence.

The question as to the improper manner in which the impressions were extracted no doubt formed an important feature of the case. But apart from such impropriety amounting to breach of trust, which entitles the injured party to appropriate reliefs, the case of *Prince Albert v. Strange* furnishes a clear

¹ *Ibid.* at p. 697.

judicial exposition of the fundamental principles of the law of copyright, viewed as literary property; and from this point of view the importance of the case cannot be over-estimated. I, therefore, make no apology in giving a long extract from the judgment of the Vice-Chancellor; in which he states his view of the origin, nature and scope of the right in question:—

“Upon the principle, therefore, of protecting *prop-* BRUCE & C., 1
erty it is that the Common Law, in cases not aided nor ‘Literary
 prejudiced by statute, shelters the privacy and seclu- property’
 sion of thoughts and sentiments committed to writing, and desired by the author to remain not generally known. This has been in effect often judicially declared, nor by any judge more distinctly than by Lord Eldon upon several occasions. In particular in Mr. Southey’s case,¹ he said, ‘it is to prevent the use of that which is the exclusive property of another, that an injunction is granted’ and, again, ‘I have examined the cases that I have been able to meet with containing precedents for injunctions of this nature, and I find that they all proceed upon the ground of a title to the property in the plaintiff.’ Such then being, as I believe, the nature and foundation of the Common Law as to manuscripts, independently of Parliamentary additions and subtractions, its operation cannot of necessity be confined to literary subjects. That would be to limit the rule by its example. Wherever the produce of labour is liable to invasion in an analogous manner, there must, I suppose, be a title to analogous protection or redress. To consider then the case of mechanical works, or works of art executed by a man for his private amusement or private use; whatever protection these, or some of these, may have by Act of Parliament, they are not, I apprehend, deserted by the Common Law. The principles and rules which it applies to literary compositions in manuscript must, I conceive, be to a considerable extent at least, applicable to these also. Mr. Justice Yates in *Millar v. Taylor*² said that an author’s case was exactly similar to that of an inventor of a new

¹ *Southey v. Sherwood* 2 Merivale 435, S.C. 35 Eng. Rep. 1006.

² 4 Burr. 2303 S.C. 98 Eng. Rep. 201.

mechanical machine; that both original inventions stood upon the same footing in point of property, whether the case were mechanical, or literary, whether an epic poem or an orrery; that the immorality of pirating another man's invention was as great as that of purloining his ideas.¹ Property in mechanical works or works of art executed by a man for his own amusement, instruction, or use, is allowed to subsist certainly, and may before publication by him be invaded, not merely by copying, but by description or by catalogue, as it appears to me. A catalogue of such works may in itself be valuable. It may also as effectually show the bent and turn of the mind, the feelings and taste of the artist, especially if not professional, as a list of his papers. The portfolio or the studio may declare as much as the writing-table. . . . Addressing the attention specifically to the particular instance before the Court, we cannot but see that etchings executed by the plaintiff and his consort for their private use, the produce of their labour, and belonging to themselves, they were entitled to retain in a state of privacy, to withhold from publication. That right, I think it equally clear, was not lost by the limited communications which they appear to have made, nor confined to prohibiting the taking of impressions without or beyond their consent from the plates, their undoubted property. It extended also, I conceive, to the prevention of persons unduly obtaining a knowledge of the subjects of the plates, from publishing (at least by printing or writing) though not by copy or resemblance, a description of them whether

¹ It is to be noted, however, that in the same case (at p. 2348) Aston J. expressed quite a different opinion on the relation between literary work and mechanical production: "that the comparison betwixt a literary work and a mechanical production, and that the right to publish the one is as free and fair as to imitate the other, carries no conviction of the truth of that position to my judgment. They appear to me very different in their nature. And the difference consists in this that the property of the maker of a mechanical engine is confined to that individual thing which he has made, that the machine made in imitation or resemblance of it, is a different work in substance, materials, labour and expense in which the maker of the original machine cannot claim any property; for it is not his, but only a resemblance of his; whereas the reprinted book is the very same substance, because its doctrine and sentiments are its essential and substantial part and the printing of it is a mere mechanical act and the method only of publishing and promulgating the contents of the book. . . . The imitated machine is a new and different work; the literary composition printed on another man's paper, is still the same."

more or less limited or summary, whether in the form of a catalogue or otherwise. But I am satisfied, I repeat, that the means of composing and forming the catalogue in question must, upon the materials now before the Court, be taken to have been obtained unduly, that is, without the consent of the plaintiff, without that of his consort, and without any right, moral, equitable or legal. Can I then deny it to be an interference with another's property? I think not. The defendant appears to me to have been seeking to make use for his own purposes of what does not belong to him. . . . I think, therefore not only that the defendant here is unlawfully invading the plaintiff's right, but also, that the invasion is of such a kind, and affects such property, as to entitle the plaintiff to the preventive remedy of an injunction."¹

Copyright (relating to books) was first made ^{8 Anne C. 19.} the subject of statute by 8 Anne C. 19 styled An Act for the Encouragement of Learning whereby it was, among other things, enacted that "from and after the tenth day of April one thousand seven hundred and ten the author of any book or books already printed or the book-seller or book-sellers, printer or printers other person or persons who hath or have purchased or acquired the copy or copies of any book or books in order to print or reprint the same shall have sole right and liberty of printing such book and books for the term of *one and twenty years*; and that the author of any book or books already composed and not printed and published, or that shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of *fourteen years*. Any one infringing this right without the consent of the proprietor or proprietors thereof, first had and obtained in writing signed in the presence of two or more credible witnesses; and any one selling, publishing or exposing to sale or causing to be sold, published, or exposed to sale any such book or books without such consent had or obtained shall forfeit such book or books and all or every sheet or sheets, being part of such book or books, to the proprietor or proprietors thereof who shall forthwith damask and

¹ See 2 De Gex & Sm. 695 *et seq.*

make waste-paper of them; and, further, every such offender or offenders shall forfeit one penny for every sheet which shall be found in his or their custody; the one moiety thereof to the Queen's Most Excellent Majesty, her heirs and successors and the other moiety thereof to any person or persons that shall sue for the same."

Is copyright a natural right or a creature of statute?

Millar v. Taylor.

It was for some time a matter of keen controversy as to whether copyright was to be regarded as a natural right dependent upon the common law of the realm or a creature of statute. In the former case, the term of copyright might be perpetual, whereas in the latter alternative its incidents, such as term of enjoyment and the like, would be determined by the specific provisions of the statute. Thus in *Millar v. Taylor* we find the following observation from Willes J. "Suppose a man with or without leave to peruse a manuscript work, transcribes and publishes it, is not within the Act of Queen Anne; it is not larceny; it is not trespass; it is not a crime indictable (the physical property of the author, the original manuscript, remains); but it is a gross violation of a valuable right. Suppose the original, or a transcript, was given or lent to a man to read for his own use, and he publishes it; it would be a violation of the author's common law right to the copy. This never was doubted and has often been determined".¹ Again, Aston J. puts the problem thus "the great question in this cause is a general one 'How the common law stands independent of the statute of 8 Anne in respect of an author's sole right to the copy of his literary productions.'"² The solution is offered by him in the following terms: "It is settled and admitted and is not now controverted but that literary compositions in their original state and the incorporeal right of the publication of them are the private and exclusive property of the author and that they may ever be retained so; and that if they are ravished from him before publication, trover or trespass lies."³ "Upon the whole, I think an author's property in his works, and the copyright is fully and sufficiently established, because it is admitted to be property in his own hands, and that he

¹ (1769) 4 Burr. 2303, at p. 2330. s.c. 98 Eng. Rep. 201 at p. 216.

² (1769) Ibid at p. 2335.

³ (1769) 4 Burr. p. 2340.

has the original right of first publishing them.”¹ Such being the judicial view with regard to what we have called copyright-before-publication the question naturally arose whether publication destroyed the property which admittedly was in the author prior to publication. If so, the position would be most contradictory. Without publication it is obviously impossible for the author to render his ‘property’ useful to mankind or profitable to himself, and yet the moment the work is published the property is extinguished. In the case of *Millar v. Taylor* the subject was argued at great length and ultimately Willes and Aston J.J. came to differ from Yates J. on this most important question. “I am of opinion” says Aston J., that the publication of a composition does not give away the property in the work; but the right of the copy still remains in the author; and that no more passes to the public from the free will and consent of the author than an unlimited use of every advantage that the purchaser can reap from the doctrine and sentiments which the work contains. He may improve upon it, imitate it, translate it, oppose its sentiments, but he buys no right to publish the identical work.”² Mr. Justice Yates, however, comes to an entirely different conclusion. “The act of publication”, says he, “when voluntarily done by the author himself is, virtually and necessarily, a gift to the public.”³ “Therefore, it appears to me that this claim of a perpetual monopoly is by no means warranted by the general principles of property; and from thence I should have thought that it could not be a part of the common law of England.”⁴

After 8 Anne, C. 19, the next statute that may be mentioned dealing with the subject of copyright is 41 Geo. III C. 107. This provides that authors of books already composed and not printed or published and of books to be composed after the passing of the Act and their assigns, shall have the sole right of printing them for fourteen years; booksellers etc., in any part of the United Kingdom or British European Dominions who shall print, reprint or import any such book without consent of the proprietor shall be liable to an action

¹ (1769) 4 Burr. p. 2346.

³ *Ibid.* at p. 2363.

² *Ibid.* at p. 2348.

⁴ *Ibid.* at p. 2367.

for damages, and shall also forfeit the books to the proprietor, and 3*d*. per sheet, half to the King and half to the informer.

It also provides that after the expiration of the said term of fourteen years, authors, if living, shall have a second term of fourteen years. The rest of the Act concerns itself with matters of procedure, such as entering books at Stationers' Hall, etc. Then comes 54 Geo. III, C. 156, which besides making certain provisions as to procedure, etc., enacted that instead of copyright for fourteen years and continuously for fourteen more, authors and their assigns shall have twenty-eight years copyright in their works and the residue of their life. All the above Acts were repealed by the Copyright Act of 1842 (5 & 6 Vict. C. 45) commonly known as Talfourd's Act. This act extended the period of copyright to the life of the author and seven years after his death, or a term of forty-two years, which ever should be the longer. The Act was admittedly defective. In draftsmanship it was obscure and ill-arranged. In substance too, it was incomplete, in as much as it did not touch cases which ought to come within the scope of copyright law. These cases had to be met by a process of tinkering of the law by means of separate or supplementary statutes which thus went on multiplying according as exigencies arose from time to time till in the year 1911 was passed an act to amend and consolidate the law relating to copyright. The object of the Act was to repeal some twenty different statutes extending back to 1734, and thus bring the whole of the copyright law within one statute. But that was not all. The act was intended to form an Imperial Code, so as to be capable of being extended as far as practicable to all the British Dominions. As regards the self-governing Dominions they could either adopt the Act in its entirety, or adopt it in substantially identical terms with such modifications or additions relating to procedure and remedies as might be necessary to adapt it to local requirements. If this object could be attained, the law of the Empire would be brought into line with the recommendations of the Berlin Convention of 1908. The Indian Copyright Act of 1914 (Act III of 1914) which governs the law in India at the

Act of 1911.
1 & 2 Geo, 5, C. 46.

The Indian Copy-
right Act, 1914 (III
of 1914)

present moment adopts the above Act of 1911, with such modifications and slight additions as may be necessary to suit local conditions. The Indian Act contains fifteen sections, mainly dealing with procedure, but introducing some variations as to substantive law as well; and the whole of the English Copyright Act of 1911 is appended thereto in the form of a Schedule. The main features¹ of the Act (including Schedule I above-mentioned) may be thus indicated :—

First, it establishes uniformity in copyright law applicable to different classes of productions such as literary, dramatic, musical, and artistic works. Hitherto these were governed by different statutes and the provisions of the statutes were far from uniform. *Secondly*, it introduces simplicity in matters of procedure by dispensing with the formality of registration. It also does away with the exception that the Crown for purposes of international copyright may impose certain formalities. The remedies for infringement are also simplified and extended. *Thirdly*, the Act confers copyright on unpublished as well as published works (Sec. 31, Sch. I). Thus the vexed question as to whether copyright-before-publication rests on common law or statute is finally set at rest. Copyright at common law is abolished and all copyright law is based on the statute. *Fourthly*, there are new subjects which the Act for the first time brings within the reach of copyright law—such as architecture, works of artistic craftsmanship, pieces for recitation and choreographic works. Nor is this all. Cinematograph productions, records, perforated rolls and other mechanical contrivances for the production of sound find an honourable place in the Act quite compatible with their importance and usefulness in present day life (Secs. 1 and 19, Sch. I). Other important additions to the subject-matter of copyright law are translations, lectures, adaptations, dramatic records, dramatised novels and novelised dramas. *Fifthly*, it lays down an uniform term for the various kinds of copyright, namely, the life of the author and fifty years thereafter,

¹ These characteristics are obviously derived from the English Copyright Act, the Copyright Act of 1911 (1 & 2 Geo. V. c. 46).

with a provision for reproduction (Sec. 3, Sch. I) after a period of twenty years (or, in the case of a work in which copyright subsists at the passing of the Act, thirty years) upon payment of certain royalties to the owner of the copyright. In case of unpublished works the term of copyright runs from the date of the making of the work until its publication and thereafter for the life of the author and fifty years after his death. If at the date of the death of the author the work happens to be still unpublished then copyright subsists until publication (it being deemed that the author died at the date of publication) and for a period of fifty years thereafter. (Sec. 17, Sch. I). *Sixthly*, the Act provides that the author shall be the first owner and that copyright shall vest in him. A different rule applies when the work in question is done on commission; in that case the copyright shall belong to the person ordering the work. If the work be done by the author in the ordinary course of his employment the copyright shall belong to the employer (Sec. 5, Sch. I). *Seventhly*, the Act removes some long-standing grievances and anomalies by allowing the author of a novel the exclusive right of dramatising and translating it and, conversely the writer of a play the exclusive right of novelising it (Section 4). On the same principle the composer of a musical composition is allowed the right (subject to exceptional privileges granted to makers of gramophones) of adapting his composition for use upon mechanical instruments (Section 1, Sch. I). *Lastly*, the system of "compulsory license" is introduced. This provides that if at any time after the death of the author of a literary, dramatic, or musical work which has been published or performed in public, the owner of the copyright refuses republication or performance of the work in public and the work is thus withheld from the public, the owner may be compelled to grant a license for reproduction or performance thereof on certain terms.

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APPENDIX.

PART I.

THE INDIAN COPYRIGHT ACT, 1914 (ACT No. III OF 1914.)

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THE FIRST SCHEDULE.

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REPEAL OF ENACTMENTS.

ACT No. III OF 1914.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

*(Received the assent of the Governor General on the 24th
February, 1914.)*

An Act to modify and add to the provisions of the Copyright Act, 1911.

WHEREAS it is expedient to modify and add to the provisions of the Copyright Act, 1911, in its application to British India; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

1. (1) This Act may be called the Indian Copyright Act, 1914. Short title and extent.

(2) It extends to the whole of British India including British Baluchistan, the District of Angul and the Sonthal Parganas.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "the Copyright Act" means the Act of Parliament entitled the Copyright Act, 1911: and

(2) words and expressions defined in the Copyright Act have the same meanings as in that Act.

CHAPTER II.

CONSTRUCTION AND MODIFICATION OF THE COPYRIGHT ACT.

3. In the application to British India of the Copyright Act (a copy of which Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, is set out in the First Schedule), the following modifications shall be made, namely:—

(1) the powers of the Board of Trade under section 3 shall, in the case of works first published in British India, be exercised by the Governor General in Council;

(2) the powers of the Board of Trade under section 19 shall, as regards records, perforated rolls and other contrivances, the original plate of which was made in British India, be exercised by the Governor General in Council; and the confirmation of Parliament shall not be necessary to the exercise of any of these powers;

- (3) the references in section 19, sub-section (4), and in section 24, sub-section (1), to arbitration shall be read as references to arbitration in accordance with the law for the time being in force in that part of British India in which the dispute occurs;
- (4) as regards works the authors whereof were at the time of the making of the works resident in British India, and as regards works first published in British India, the reference in section 22 to the Patents and Designs Act, 1907, shall be construed as a reference to the Indian Patents and Designs Act, 1911, and the reference in the said section to section 86 of the Patents and Designs Act, 1907, shall be construed as a reference to section 77 of the Indian Patents and Designs Act, 1911;
- (5) as regards works first published in British India, the reference in section 24, sub-section (1), proviso (a), to the London Gazette and two London newspapers shall be construed as a reference to the Gazette of India and two newspapers published in British India: and the reference in proviso (b) of the same sub-section of the same section to the 26th day of July, 1910, shall, as regards works the authors whereof were at the time of the making of the works resident in British India, and as regards works first published in British India, be construed as a reference to the 30th day of October, 1912.

7 Edw. VII, Cap.
20.

II of 1911

7 Edw VII, Cap.
29.

II of 1911.

Modification of
copyright as
regards translation
of works first
published in
British India

4. (1) In the case of works first published in British India, copyright shall be subject to this limitation that the sole right to produce, reproduce, perform or publish a translation of the work shall subsist only for a period of ten years from the date of the first publication of the work:

Provided that if within the said period the author, or any person to whom he has granted permission so to do, publishes a translation of any such work in any language, copyright in such work as regards the sole right to produce, reproduce, perform or publish a translation in that language shall not be subject to the limitation prescribed in this sub-section.

(2) For the purposes of sub-section (1) the expression "author" includes the legal representative of a deceased author.

Musical works
made by resident
of, or first
published in,
British India.

5. In the application of the Copyright Act to musical works the authors whereof were at the time of the making of the works resident in British India, or to musical works first published in British India, the term "musical work" shall, save as otherwise expressly provided by the Copyright Act, mean "any combination of melody and harmony, or either of them, which has been reduced to writing."

Importation of
copies

6. (1) Copies made out of British India of any work in which copyright subsists which if made in British India would infringe copyright, and as to which the owner of the copyright gives notice in writing by himself or his agent to the Chief Customs officer, as defined in the Sea Customs Act, 1878, that he

VIII of 1878.

is desirous that such copies should not be imported into British India, shall not be so imported, and shall, subject to the provisions of this section, be deemed to be prohibited imports within the meaning of section 18 of the Sea Customs Act, 1878.

VIII of 1878.

(2) Before detaining any such copies, or taking any further proceedings with a view to the confiscation thereof, such Chief Customs officer, or any other officer appointed by the Local Government in this behalf, may require the regulations under this section, whether as to information, security, conditions or other matters, to be complied with, and may satisfy himself, in accordance with these regulations, that the copies are such as are prohibited by this section to be imported.

(3) The Governor General in Council may, by notification in the Gazette of India, make regulations, either general or special, respecting the detention and confiscation of copies the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and confiscation; and may, by such regulations, determine the information, notices and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4) Such regulations may apply to copies of all works the importation of copies of which is prohibited by this section, or different regulations may be made respecting different classes of such works.

(5) The regulations may provide for the informant reimbursing the Secretary of State for India in Council all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention; and may provide that notices given under the Copyright Act to the Commissioners of Customs and Excise of the United Kingdom, and communicated by that authority to any authority in British India, shall be deemed to have been given by the owner to the said Chief Customs officer.

(6) This section shall have effect as the necessary modification of section 14 of the Copyright Act.

CHAPTER III.

PENALTIES.

7. If any person knowingly—

Offences in respect
of infringing copies

- (a) makes for sale or hire any infringing copy of a work in which copyright subsists; or
- (b) sells or lets for hire, or by way of trade exposes or offers for sale or hire, any infringing copy of any such work; or
- (c) distributes infringing copies of any such work, either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or

(d) by way of trade exhibits in public any infringing copy of any such work ; or

(e) imports for sale or hire into British India any infringing copy of any such work ;

he shall be punishable with fine which may extend to twenty rupees for every copy dealt with in contravention of this section, but not exceeding five hundred rupees in respect of the same transaction.

Possession of plates for purpose of making infringing copies.

8. If any person knowingly makes, or has in his possession, any plate for the purpose of making infringing copies of any work in which copyright subsists, or knowingly and for his private profit causes any such work to be performed in public without the consent of the owner of the copyright, he shall be punishable with fine which may extend to five hundred rupees.

Punishment on second conviction.

9. If any person, after having been previously convicted of an offence punishable under section 7 or section 8 is subsequently convicted of an offence punishable under either of these sections, he shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

Power of Court to dispose of infringing copies or plates for purpose of making infringing copies

10. (1) The Court before which any offence under this Chapter is tried may, whether the alleged offender, is convicted or not, order that all copies of the work or all plates in the possession of the alleged offender, which appear to it to be infringing copies, or plates for the purpose of making infringing copies, be destroyed or delivered up to the owner of the copyright, or otherwise dealt with as the Court may think fit.

(2) Any person affected by an order under sub-section (1) may, within thirty days of the date of such order, appeal to the Court to which appeals from the Court making the order ordinarily lie ; and such appellate Court may direct that execution of the order be stayed pending consideration of the appeal.

Cognizance of offences.

11 No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence against this Act.

Saving in case of infringement by construction of building.

12. The provisions of this Chapter shall not apply to any case to which section 9 of the Copyright Act, regarding the restrictions on remedies in the case of a work of architecture, applies.

CHAPTER IV.

MISCELLANEOUS.

Courts having civil jurisdiction regarding infringement of copyright.

13. Every suit or other civil proceeding regarding infringement of copyright shall be instituted and tried in the High Court or the Court of the District Judge.

Effect of non-registration under Act XX of 1847.

14. No suit or other civil proceeding instituted after the 30th of October, 1912, regarding infringement of copyright in any book the author whereof was at the time of making the book resident in British India, or of any book first published in British India, shall be dismissed by reason only that the registration of

such book had not been effected in accordance with the provisions of the Indian Copyright Act, 1847. XX of 1847

15. The enactments mentioned in the Second Schedule are hereby repealed to the extent specified in the fourth column thereof.

THE FIRST SCHEDULE.

PORTIONS OF THE COPYRIGHT ACT APPLICABLE TO BRITISH
INDIA.

(See section 3.)

COPYRIGHT ACT, 1911.

[1 & 2 GEO. 5, C. 46.]

ARRANGEMENT OF SECTIONS.

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IMPERIAL COPYRIGHT.

Rights.

SECTIONS.

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2. Infringement of copyright
3. Term of copyright.
4. Compulsory licences
5. Ownership of copyright, etc.

Civil Remedies.

6. Civil remedies for infringement of copyright.
7. Rights of owner against persons possessing or dealing with infringing copies, etc.
8. Exemption of innocent infringer from liability to pay damages, etc.
9. Restriction on remedies in the case of architecture.
10. Limitation of actions.

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Importation of Copies.

14. Importation of copies.

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15. Delivery of copies to British Museum and other libraries.

SECTIONS.

Special Provisions as to certain Works.

16. Works of joint authors.
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21. Provisions as to photographs
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24. Existing works.

Application to British Possessions.

25. Application of Act to British dominions.
26. Legislative powers of self-governing dominions.
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PART II.

INTERNATIONAL COPYRIGHT.

29. Power to extend Act to foreign works.
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PART III.

SUPPLEMENTAL PROVISIONS.

31. Abrogation of common law rights.
32. Provisions as to Orders in Council.
33. Saving of university copyright
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SCHEDULES.

.CHAPTER 46.

AN ACT TO AMEND AND CONSOLIDATE THE LAW
RELATING TO COPYRIGHT.

[16TH DECEMBER, 1911.]

Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal,

and Commons in this present Parliament assembled, and by the authority of the same, as follows:—

PART I.

IMPERIAL COPYRIGHT.

Rights.

1. (1) Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original literary, dramatic, musical and artistic work, if—

- (a) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid; and
- (b) in the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid;

but in no other works, except so far as the protection conferred by this Act is extended by Orders in Council thereunder relating to self-governing dominions to which this Act does not extend and to foreign countries.

(2) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right—

- (a) to produce, reproduce, perform, or publish any translation of the work;
- (b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work;
- (c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise;
- (d) in the case of a literary dramatic or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered;

and to authorise any such acts as aforesaid

(3) For the purposes of this Act, publication, in relation to any work, means the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition of an artistic work, or the construction of an architectural work of art, but, for the purposes of this provision, the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works.

2. (1) Copyright in a work shall be deemed to be infringed Infringement of
by any person who, without the consent of the owner of the copyright.

copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright: Provided that the following acts shall not constitute an infringement of copyright:—

- (i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary:
- (ii) Where the author of an artistic work is not the owner of the copyright therein, the use by the author of any mould, cast, sketch, plan, model or study made by him for the purpose of the work, provided that he does not thereby repeat or imitate the main design of that work:
- (iii) The making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, if permanently situate in a public place or building, or the making or publishing of paintings, drawings, engravings or photographs (which are not in the nature of architectural drawings or plans) of any architectural work of art:
- (iv) The publication in a collection, mainly composed of non-copyright matter, *bona fide* intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools in which copyright subsists: Provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged:
- (v) The publication in a newspaper of a report of a lecture delivered in public, unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given, and, except whilst the building is being used for public worship, in a position near the lecturer; but nothing in this paragraph shall affect the provisions in paragraph (i) as to newspaper summaries:
- (vi) The reading or recitation in public by one person of any reasonable extract from any published work.

(2) Copyright in a work shall also be deemed to be infringed by any person who—

- (a) sells or lets for hire, or by way of trade exposes or offers for sale or hire; or
- (b) distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or
- (c) by way of trade exhibits in public; or

(d) imports for sale or hire into any part of His Majesty's dominions to which this Act extends,

any work which to his knowledge infringes copyright or would infringe copyright if it had been made within the part of His Majesty's dominions in or into which the sale or hiring, exposure, offering, for sale or hire, distribution, exhibition, or importation took place.

(3) Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright, unless he was not aware and had no reasonable ground for suspecting that the performance would be an infringement of copyright.

3. The term for which copyright shall subsist shall, except ^{Term of} as otherwise expressly provided by this Act, be the life of the ^{copyright.} author and a period of fifty years after his death :

Provided that at any time after the expiration of twenty-five years, or in the case of a work in which copyright subsists at the passing of this Act thirty years from the death of the author of a published work, copyright in the work shall not be deemed to be infringed by the reproduction of the work for sale if the person reproducing the work proves that he has given the prescribed notice in writing of his intention to reproduce the work, and that he has paid in the prescribed manner to, or for the benefit of, the owner of the copyright royalties in respect of all copies of the work sold by him calculated at the rate of ten per cent on the price at which he publishes the work; and, for the purposes of this proviso, the Board of Trade may make regulations prescribing the mode in which notices are to be given, and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, including (if they think fit) regulations requiring payment in advance or otherwise securing the payment of royalties

4. If, at any time after the death of the author of a ^{Compulsory} literary dramatic or musical work which has been published or ^{licences.} performed in public, a complaint is made to the Judicial Committee of the Privy Council that the owner of the copyright in the work has refused to republish or to allow the republication of the work or has refused to allow the performance in public of the work, and that by reason of such refusal the work is withheld from the public, the owner of the copyright may be ordered to grant a licence to reproduce the work or perform the work in public, as the case may be, on such terms and subject to such conditions as the Judicial Committee may think fit.

5. (1) Subject to the provisions of this Act, the author of ^{Ownership or} a work shall be the first owner of the copyright therein: ^{copyright, etc.}

Provided that—

(a) where, in the case of an engraving, photograph, or portrait, the plate or other original was ordered by some other person and was made for valuable

consideration in pursuance of that order, then, in the absence of any agreement to the contrary, the person by whom such plate or other original was ordered shall be the first owner of the copyright;

- (b) where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine, or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine, or similar periodical.

(2) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations to the United Kingdom or any self-governing dominion or other part of His Majesty's dominions to which this Act extends, and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by licence, but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorised agent:

Provided that, where the author of a work is the first owner of the copyright therein, no assignment of the copyright, and no grant of any interest therein, made by him (otherwise than by will) after the passing of this Act, shall be operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to the disposition of such reversionary interest shall be null and void, but nothing in this proviso shall be construed as applying to the assignment of the copyright in a collective work or a licence to publish a work or part of a work as part of a collective work.

(3) Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee, as respects the rights so assigned, and the assignor, as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and the provisions of this Act shall have effect accordingly.

Civil Remedies.

6. (1) Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by

this Act, be entitled to all such remedies by way of injunction or interdict, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right.

(2) The costs of all parties in any proceedings in respect of the infringement of copyright shall be in the absolute discretion of the Court.

(3) In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright subsists and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright, or, as the case may be, the title of the plaintiff, and where any such question is in issue, then—

(a) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work ;

(b) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein.

7. All infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof. Rights of owner against persons possessing or dealing with infringing copies, etc.

8. Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement if the defendant proves that at the date of the infringement he was not aware, and had not reasonable ground for suspecting, that copyright subsisted in the work. Exemption of innocent infringer from liability to pay damages, etc.

9. (1) Where the construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work has been commenced, the owner of the copyright shall not be entitled to obtain an injunction or interdict to restrain the construction of such building or structure or to order its demolition. Restriction on remedies in the case of architecture.

(2) Such of the other provisions of this Act as provide that an infringing copy of a work shall be deemed to be the property of the owner of the copyright, or as impose summary

penalties, shall not apply in any case to which this section applies.

Limitation of
actions.

10. An action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement.

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Importation of copies.

Importation of
copies.

14. (1) Copies made out of the United Kingdom of any work in which copyright subsists which if made in the United Kingdom would infringe copyright, and as to which the owner of the copyright gives notice in writing by himself or his agent to the Commissioners of Customs and Excise, that he is desirous that such copies should not be imported into the United Kingdom, shall not be so imported, and shall, subject to the provisions of this section, be deemed to be included in the table of prohibitions and restrictions contained in section forty-two of the Customs Consolidation Act, 1876, and that section shall apply accordingly.

39 & 40 Vict., c. 36.

(2) Before detaining any such copies or taking any further proceedings with a view to the forfeiture thereof under the law relating to the Customs, the Commissioners of Customs and Excise may require the regulations under this section, whether as to information, conditions, or other matters, to be complied with, and may satisfy themselves in accordance with those regulations that the copies are such as are prohibited by this section to be imported.

(3) The Commissioners of Customs and Excise may make regulations, either general or special, respecting the detention and forfeiture of copies the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may, by such regulations, determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4) The regulations may apply to copies of all works the importation of copies of which is prohibited by this section, or different regulations may be made respecting different classes of such works.

(5) The regulations may provide for the informant reimbursing the Commissioners of Customs and Excise all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention; and may provide for notices under any enactment repealed by this Act being treated as notices given under this section.

(6) The foregoing provisions of this section shall have effect as if they were part of the Customs Consolidation Act, 1876: Provided that, notwithstanding anything in that Act,

the Isle of Man shall not be treated as part of the United Kingdom for the purposes of this section.

(7) This section shall, with the necessary modifications, apply to the importation into a British possession to which this Act extends of copies of works made out of that possession.

Delivery of Books to Libraries.

15. (1) The publisher of every book published in the United Kingdom shall, within one month after the publication, deliver, at his own expense, a copy of the book to the trustees of the British Museum, who shall give a written receipt for it. Delivery of copies to British Museum and other libraries.

(2) He shall also, if written demand is made before the expiration of twelve months after publication, deliver within one month after receipt of that written demand or, if the demand was made before publication, within one month after publication, to some depôt in London named in the demand a copy of the book for, or in accordance with the directions of, the authority having the control of each of the following libraries, namely: the Bodleian Library, Oxford, the University Library, Cambridge, the Library of the Faculty of Advocates at Edinburgh and the Library of Trinity College, Dublin; and, subject to the provisions of this section, the National Library of Wales. In the case of an encyclopædia, newspaper, review, magazine, or work published in a series of numbers or parts, the written demand may include all numbers or parts of the work which may be subsequently published.

(3) The copy delivered to the trustees of the British Museum shall be a copy of the whole book with all maps and illustrations belonging thereto, finished and coloured in the same manner as the best copies of the book are published, and shall be bound, sewed, or stitched together, and on the best paper on which the book is printed.

(4) The copy delivered for the other authorities mentioned in this section shall be on the paper on which the largest number of copies of the book is printed for sale, and shall be in the like condition as the books prepared for sale.

(5) The books of which copies are to be delivered to the National Library of Wales shall not include books of such classes as may be specified in regulations to be made by the Board of Trade.

(6) If a publisher fails to comply with this section, he shall be liable on summary conviction to a fine not exceeding five pounds and the value of the book, and the fine shall be paid to the trustees or authority to whom the book ought to have been delivered.

(7) For the purposes of this section, the expression "book" includes every part or division of a book, pamphlet, sheet of letter-press, sheet of music, map, plan, chart or table separately published, but shall not include any second or subsequent edition of a book unless such edition contains additions or alterations either in the letter press or in the maps, prints, or other engravings belonging thereto.

Special Provisions as to certain Works.

Works of joint
authors.

16. (1) In the case of a work of joint authorship, copyright shall subsist during the life of the author who first dies and for a term of fifty years after his death, or during the life of the author who dies last, whichever period is the longer, and references in this Act to the period after the expiration of any specified number of years from the death of the author shall be construed as references to the period after the expiration of the like number of years from the death of the author who dies first or after the death of the author who dies last, whichever period may be the shorter, and in the provisions of this Act with respect to the grant of compulsory licences a reference to the date of the death of the author who dies last shall be substituted for the reference to the date of the death of the author.

(2) Where, in the case of a work of joint authorship some one or more of the joint authors do not satisfy the conditions conferring copyright laid down by this Act, the work shall be treated for the purposes of this Act as if the other author or authors had been the sole author or authors thereof:

Provided that the term of the copyright shall be the same as it would have been if all the authors had satisfied such conditions as aforesaid

(3) For the purposes of this Act "a work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.

(4) Where a married woman and her husband are joint authors of a work the interest of such married woman therein shall be her separate property.

Posthumous works

17. (1) In the case of a literary dramatic or musical work, or an engraving, in which copyright subsists at the date of the death of the author or, in the case of a work of joint authorship at or immediately before the date of the death of the author who dies last, but which has not been published, nor, in the case of a dramatic or musical work, been performed in public, nor, in the case of a lecture, been delivered in public, before that date, copyright shall subsist till publication, or performance or delivery in public, whichever may first happen, and for a term of fifty years thereafter, and the proviso to section three of this Act shall, in the case of such a work, apply as if the author had died at the date of such publication or performance or delivery in public as aforesaid.

(2) The ownership of an author's manuscript after his death, where such ownership has been acquired under a testamentary disposition made by the author and the manuscript is of a work which has not been published nor performed in public nor delivered in public, shall be *prima facie* proof of the copyright being with the owner of the manuscript.

Provisions as to
Government
publications.

18. Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government

department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.

19. (1) Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works, but the term of copyright shall be fifty years from the making of the original plate from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts. Provisions as to
mechanical
instruments.

(2) It shall not be deemed to be an infringement of copyright in any musical work for any person to make, within the parts of His Majesty's dominions to which this Act extends, records, perforated roles or other contrivances by means of which the work may be mechanically performed, if such person proves—

- (a) that such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work; and
- (b) that he has given the prescribed notice of his intention to make the contrivances, and has paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all such contrivances sold by him, calculated at the rate hereinafter mentioned :

Provided that—

- (i) nothing in this provision shall authorise any alteration in, or omissions from, the work reproduced, unless contrivances reproducing the work subject to similar alterations and omissions have been previously made by, or with the consent or acquiescence of, the owner of the copyright, or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question; and
- (ii) for the purposes of this provision, a musical work shall be deemed to include any words so closely associated therewith as to form part of the same work, but shall not be deemed to include a contrivance by means of which sounds may be mechanically reproduced.

(3) The rate at which such royalties as aforesaid are to be calculated shall—

- (a) in the case of contrivances sold within two years after the commencement of this Act by the person making the same, be two and one-half per cent; and

- (b) in the case of contrivances sold as aforesaid after the expiration of that period, be five per cent.

on the ordinary retail selling price of the contrivance calculated in the prescribed manner, so however that the royalty payable in respect of a contrivance shall, in no case, be less than a half-penny for each separate musical work in which copyright subsists reproduced thereon, and, where the royalty calculated as aforesaid includes a fraction of a farthing, such fraction shall be reckoned as a farthing :

Provided that, if, at any time after the expiration of seven years from the commencement of this Act, it appears to the Board of Trade that such rate as aforesaid is no longer equitable, the Board of Trade may, after holding a public inquiry, make an order either decreasing or increasing that rate to such extent as under the circumstances may seem just, but any order so made shall be provisional only and shall not have any effect unless and until confirmed by Parliament ; but, where an order revising the rate has been so made and confirmed, no further revision shall be made before the expiration of fourteen years from the date of the last revision.

(4) If any such contrivance is made reproducing two or more different works in which copyright subsists and the owners of the copyright therein are different persons, the sums payable by way of royalties under this section shall be apportioned amongst the several owners of the copyright in such proportions as, failing agreement may be determined by arbitration

(5) When any such contrivances by means of which a musical work may be mechanically performed have been made, then, for the purposes of this section, the owner of the copyright in the work shall, in relation to any person who makes the prescribed inquiries, be deemed to have given his consent to the making of such contrivances if he fails to reply to such inquiries within the prescribed time.

(6) For the purposes of this section, the Board of Trade may make regulations prescribing anything which under this section is to be prescribed, and prescribing the mode in which notices are to be given and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, and any such regulations may, if the Board think fit, include regulations requiring payment in advance or otherwise securing the payment of royalties

(7) In the case of musical works published before the commencement of this Act, the foregoing provisions shall have effect, subject to the following modifications and additions :—

- (a) The conditions as to the previous making by, or with the consent or acquiescence of, the owner of the copyright in the work, and the restrictions as to alterations in or omissions from the work shall not apply :

- (b) The rate of two and one-half per cent shall be substituted for the rate of five per cent as the rate at which royalties are to be calculated, but no royalties

shall be payable in respect of contrivances sold before the first day of July, nineteen hundred and thirteen, if contrivances reproducing the same work had been lawfully made, or placed on sale, within the parts of His Majesty's dominions to which this Act extends before the first day of July, nineteen hundred and ten :

- (c) Notwithstanding any assignment made before the passing of this Act of the copyright in a musical work, any rights conferred by this Act in respect of the making, or authorising the making of contrivances by means of which the work may be mechanically performed shall belong to the author or his legal personal representatives and not to the assignees and the royalties aforesaid shall be payable to, and for the benefit of, the author of the work or his legal personal representatives :
- (d) The saving contained in this Act of the rights and interests arising from, or in connexion with, action taken before the commencement of this Act shall not be construed as authorising any person who has made contrivances by means of which the work may be mechanically performed to sell any such contrivances, whether made before or after the passing of this Act, except on the terms and subject to the conditions laid down in this section :
- (e) Where the work is a work on which copyright is conferred by an Order in Council relating to a foreign country, the copyright so conferred shall not, except to such extent as may be provided by the Order, include any rights with respect to the making of records, perforated rolls or other contrivances by means of which the work may be mechanically performed.

(f) Notwithstanding anything in this Act where a record, perforated roll, or other contrivance by means of which sounds may be mechanically reproduced has been made before the commencement of this Act, copyright shall, as from the commencement of this Act, subsist therein in like manner and for the like term as if this Act had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived :

Provided that—

- (i) the person who, at the commencement of this Act, is the owner of such original plate shall be the first owner of such copyright ; and
- (ii) nothing in this provision shall be construed as conferring copyright in any such contrivance if the making thereof would have infringed copyright in some other such contrivance, if this provision had been in force at the time of the making of the first-mentioned contrivance.

Provision as to
political speeches.

20. Notwithstanding anything in this Act it shall not be an infringement of copyright in an address of a political nature delivered at a public meeting to publish a report thereof in a newspaper.

Provision as to
photographs.

21. The term for which copyright shall subsist in photographs shall be fifty years from the making of the original negative from which the photograph was directly or indirectly derived, and the person who was owner of such negative at the time when such negative was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts

Provisions as to
designs registrable
under 7 Edw. 7,
c. 29.

22. (1) This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process.

(2) General rules under section eighty six of the Patents and Designs Act, 1907, may be made for determining the conditions under which a design shall be deemed to be used for such purposes as aforesaid.

Work of foreign
authors first
published in parts
of His
Majesty's
dominions to
which Act
extends.

23. If it appears to His Majesty that a foreign country does not give, or, has not undertaken to give, adequate protection to the works of British authors, it shall be lawful for His Majesty by Order in Council to direct that such of the provisions of this Act as confer copyright on works first published within the parts of His Majesty's dominions to which this Act extends, shall not apply to works published after the date specified in the Order, the authors whereof are subjects or citizens of such foreign country, and are not resident in His Majesty's dominions, and thereupon those provisions shall not apply to such work.

Existing works.

24. (1) Where any person is immediately before the commencement of this Act entitled to any such right in any such work as is specified in the first column of the First Schedule to this Act, or to any interest in such a right, he shall, as from that date, be entitled to the substituted right set forth in the second column of that schedule, or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made and the work had been one entitled to copyright thereunder:

Provided that—

(a) if the author of any work in which any such right as is specified in the first column of the First Schedule to this Act subsists at the commencement of this Act has, before that date, assigned the right or granted any interest therein for the whole term of the right, then at the date when, but for the passing of this Act, the right would have expired the sub-

stituted right conferred by this section shall, in the absence of express agreement, pass to the author of the work, and any interest therein created before the commencement of this Act and then subsisting shall determine; but the person who immediately before the date at which the right would so have expired was the owner of the right or interest shall be entitled at his option either—

- (i) on giving such notice as hereinafter mentioned, to an assignment of the right or the grant of a similar interest therein for the remainder of the term of the right for such consideration as, failing agreement, may be determined by arbitration; or
- (ii) without any such assignment or grant, to continue to reproduce or perform the work in like manner as theretofore subject to the payment, if demanded by the author within three years after the date at which the right would have so expired, of such royalties to the author as, failing agreement, may be determined by arbitration, or, where the work is incorporated in a collective work and the owner of the right or interest is the proprietor of that collective work, without any such payment;

The notice above referred to must be given not more than one year nor less than six months before the date at which the right would have so expired, and must be sent by registered post to the author, or, if he cannot with reasonable diligence be found, advertised in the London Gazette and in two London newspapers;

- (b) where any person has, before the twenty-sixth day of July, nineteen hundred and ten, taken any action whereby he has incurred any expenditure or liability in connexion with the reproduction or performance of any work in a manner which at the time was lawful, or for the purpose of or with a view to the reproduction or performance of a work at a time when such reproduction or performance would, but for the passing of this Act, have been lawful, nothing in this section shall diminish or prejudice any rights or interest arising from or in connexion with such action which are subsisting and valuable at the said date, unless the person who by virtue of this section becomes entitled to restrain such reproduction or performance agrees to pay such compensation as, failing agreement, may be determined by arbitration.

(2) For the purposes of this section, the expression “author” includes the legal personal representatives of a deceased author.

(3) Subject to the provisions of section 19, sub-sections (7) and (8) and of section 33 of this Act, copyright shall not

subsist in any work made before the commencement of this Act, otherwise than under, and in accordance with, the provisions of this section.

Application to British Possessions

Application of
Act to British
dominions.

25. (1) This Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, shall extend throughout His Majesty's dominions: Provided that it shall not extend to a self governing dominion unless declared by the Legislature of that dominion to be in force therein either without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the dominion, as may be enacted by such Legislature.

(2) If the Secretary of State certifies by notice published in the London Gazette that any self-governing dominion has passed legislation under which works, the authors whereof were at the date of the making of the works British subjects resident elsewhere than in the dominion or (not being British subjects) were resident in the parts of His Majesty's dominions to which this Act extends, enjoy within the dominion rights substantially indetical with those conferred by this Act, then, whilst such legislation continues in force, the dominion shall, for the purposes of the rights conferred by this Act, be treated as if it were a dominion to which this Act extends; and it shall be lawful for the Secretary of State to give such a certificate as aforesaid, notwithstanding that the remedies for enforcing the rights, or the restrictions on the importation of copies of works, manufactured in a foreign country, under the law of the dominion, differ from those under this Act.

Legislative powers
of self-governing
dominions.

26. (1) The Legislature of any self-governing dominion may, at any time, repeal all or any of the enactments relating to copyright passed by Parliament (including this Act) so far as they are operative within that dominion: Provided that no such repeal shall prejudicially affect any legal rights existing at the time of the repeal, and that, on this Act or any part thereof being so repealed by the Legislature of a self-governing dominion, that dominion shall cease to be a dominion to which this Act extends.

(2) In any self-governing dominion to which this Act does not extend the enactments repealed by this Act shall, so far as they are operative in that dominion, continue in force until repealed by the Legislature of that dominion.

(3) Where His Majesty in Council is satisfied that the law of a self-governing dominion to which this Act does not extend provides adequate protection within the dominion for the works (whether published or unpublished) of authors who at the time of the making of the work were British subjects resident elsewhere than in that dominion, His Majesty in Council may, for the purpose of giving reciprocal protection, direct that this Act, except such parts (if any) thereof as may be specified in the Order, and subject to any conditions contained therein, shall,

within the parts of His Majesty's dominions to which this Act extends, apply to works the authors whereof were, at the time of the making of the work, resident within the first-mentioned dominion, and to works first published in that dominion; but save as provided by such an Order, works the authors whereof were resident in a dominion to which this Act does not extend shall not, whether they are British subjects or not, be entitled to any protection under this Act except such protection as is by this Act conferred on works first published within the parts of His Majesty's dominions to which this Act extends:

Provided that no such Order shall confer any rights within a self-governing dominion, but the Governor in Council of any self-governing dominion to which this Act extends may, by Order, confer within that dominion the like rights as His Majesty in Council is, under the foregoing provisions of this sub-section, authorised to confer within other parts of His Majesty's dominions.

For the purposes of this sub-section, the expression "a dominion to which this Act extends" includes a dominion which is for the purposes of this Act to be treated as if it were a dominion to which this Act extends.

27. The Legislature of any British possession to which this Act extends may modify or add to any of the provisions of this Act in its application to the possession, but, except so far as such modifications and additions relate to procedure and remedies, they shall apply only to works the authors whereof were, at the time of the making of the work, resident in the possession, and to works first published in the possession.

Power of
Legislatures of
British possessions
to pass
supplemental
legislation

28. His Majesty may, by Order in Council, extend this Act to any territories under his protection and to Cyprus, and, on the making of any such Order, this Act shall, subject to the provisions of the Order, have effect as if the territories to which it applies or Cyprus were part of His Majesty's dominions to which this Act extends

Application to
protectorates.

PART II.

INTERNATIONAL COPYRIGHT.

29. (1) His Majesty may, by Order in Council, direct that this Act (except such parts, if any, thereof as may be specified in the Order) shall apply—

Power to extend
Act to foreign
works.

- (a) to works first published in a foreign country to which the Order relates, in like manner as if they were first published within the parts of His Majesty's dominions to which this Act extends;
- (b) to literary, dramatic, musical and artistic works, or any class thereof, the authors whereof were, at the time of the making of the works, subjects or citizens of a foreign country to which the Order relates, in like manner as if the authors were British subjects;
- (c) in respect of residence in a foreign country to which

the Order relates, in like manner as if such residence were residence in the parts of His Majesty's dominions to which this Act extends;

and thereupon, subject to the provisions of this Part of this Act and of the Order, this Act shall apply accordingly :

Provided that—

- (i) before making an Order in Council under this section in respect of any foreign country (other than a country with which His Majesty has entered into a convention relating to copyright), His Majesty shall be satisfied that that foreign country has made, or undertaken to make, such provisions, if any, as it appears to His Majesty expedient to require for the protection of works entitled to copyright under the provisions of Part I of this Act;
- (ii) the Order in Council may provide that the term of copyright within such parts of His Majesty's dominions as aforesaid shall not exceed that conferred by the law of the country to which the Order relates;
- (iii) the provisions of this Act as to the delivery of copies of books shall not apply to works first published in such country, except so far as is provided by the Order;
- (iv) the Order in Council may provide that the enjoyment of the rights conferred by this Act shall be subject to the accomplishment of such conditions and formalities (if any) as may be prescribed by the Order;
- (v) in applying the provisions of this Act as to ownership of copyright, the Order in Council may make such modifications as appear necessary having regard to the law of the foreign country;
- (vi) in applying the provisions of this Act as to existing works, the Order in Council may make such modifications as appear necessary, and may provide that nothing in those provisions as so applied shall be construed as reviving any right of preventing the production or importation of any translation in any case where the right has ceased by virtue of section 5 of the International Copyright Act, 1886.

49 & 50 Vict., c. 33.

(2) An Order in Council under this section may extend to all the several countries named or described therein.

Application of Part II to British possessions.

30. (1) An Order in Council under this Part of this Act shall apply to all His Majesty's dominions to which this Act extends except self-governing dominions and any other possessions specified in the Order with respect to which it appears to His Majesty expedient that the Order should not apply.

(2) The Governor in Council of any self-governing dominion to which this Act extends may, as respects that dominion, make the like Orders as under this Part of this Act His Majesty in Council is authorised to make with respect to His Majesty's dominions other than self-governing dominions, and the provi-

sions of this Part of this Act shall, with the necessary modifications, apply accordingly.

(3) Where it appears to His Majesty expedient to except from the provisions of any Order any part of his dominions, not being a self-governing dominion, it shall be lawful for His Majesty by the same or any other Order in Council to declare that such Order and this Part of this Act shall not, and the same shall not, apply to such part, except so far as is necessary for preventing any prejudice to any rights acquired previously to the date of such Order.

PART III.

SUPPLEMENTAL PROVISIONS.

31. No person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence. Abrogation of common law rights.

32. (1) His Majesty in Council may make Orders for altering, revoking, or varying any Order in Council made under this Act, or under any enactments repealed by this Act, but any Order made under this section shall not affect prejudicially any rights or interests acquired or accrued at the date when the Order comes into operation, and shall provide for the protection of such rights and interests. Provisions as to Orders in Council.

(2) Every Order in Council made under this Act shall be published in the *London Gazette* and shall be laid before both Houses of Parliament as soon as may be after it is made, and shall have effect as if enacted in this Act.

33. Nothing in this Act shall deprive any of the universities and colleges mentioned in the Copyright Act, 1775, of any copyright they already possess under that Act, but the remedies and penalties for infringement of any such copyright shall be under this Act and not under that Act. Saving of University copyright.
15 Geo. 3, c. 53.

34. There shall continue to be charged on, and paid out of, the Consolidated Fund of the United Kingdom such annual compensation as was immediately before the commencement of this Act payable in pursuance of any Act as compensation to a library for the loss of the right to receive gratuitous copies of books: Saving of compensation to certain libraries.

Provided that this compensation shall not be paid to a library in any year, unless the Treasury are satisfied that the compensation for the previous year has been applied in the purchase of books for the use of and to be preserved in the library.

35. (1) In this Act, unless the context otherwise requires— Interpretation.

“Literary work” includes maps, charts, plans, tables, and compilations;

“Dramatic work” includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in

- writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character;
- “ Artistic work ” includes works of painting, drawing, sculpture and artistic craftsmanship and architectural works of art and engravings and photographs ;
- “ Work of sculpture ” includes casts and models ;
- “ Architectural work of art ” means any building or structure having an artistic character or design, in respect of such character or design or any model for such building or structure provided that the protection afforded by this Act shall be confined to the artistic character and design, and shall not extend to processes or methods of construction ;
- “ Engravings ” include etchings, lithographs, wood-cuts prints, and other similar works, not being photographs ;
- “ Photograph ” includes photo-lithograph and any work produced by any process analogous to photography ;
- “ Cinematograph ” includes any work produced by any process analogous to cinematography ;
- “ Collective work ” means—
- (a) an encyclopædia, dictionary, year book, or similar work ;
 - (b) a newspaper, review, magazine, or similar periodical ; and
 - (c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated ;
- “ Infringing,” when applied to a copy of work in which copyright subsists, means any copy, including any colourable imitation, made or imported in contravention of the provisions of this Act ;
- “ Performance ” means any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument ;
- “ Delivery,” in relation to a lecture, includes delivery by means of any mechanical instrument ;
- “ Plate ” includes any stereotype or other plate, stone, block, mould, matrix, transfer. or negative used or intended to be used for printing or reproducing copies of any work, and any matrix or other appliance by which records, perforated rolls or other contrivances for the acoustic representation of the work are or are intended to be made ;
- “ Lecture ” includes address, speech, and sermon ;
- “ Self governing dominion ” means the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland.

(2) For the purposes of this Act (other than those relating to infringements of copyright), a work shall not be deemed to be published or performed in public, and a lecture shall not be deemed to be delivered in public, if published, performed in public, or delivered in public, without the consent or acquiescence of the author, his executors, administrators or assigns.

(3) For the purposes of this Act a work shall be deemed to be first published within the parts of His Majesty's dominions to which this Act extends, notwithstanding that it has been published simultaneously in some other place, unless the publication in such parts of His Majesty's dominions as afore-said is colourable only and is not intended to satisfy the reasonable requirements of the public, and a work shall be deemed to be published simultaneously in two places if the time between the publication in one such place and the publication in the other place does not exceed fourteen days, or such longer period as may, for the time being, be fixed by Order in Council

(4) Where, in the case of an unpublished work, the making of a work has extended over a considerable period, the conditions of this Act conferring copyright shall be deemed to have been complied with, if the author was, during any substantial part of that period, a British subject or a resident within the parts of His Majesty's dominions to which this Act extends.

(5) For the purposes of the provisions of this Act as to residence, an author of a work shall be deemed to be resident in the parts of His Majesty's dominions to which this Act extends if he is domiciled within any such part.

36. Subject to the provisions of this Act, the enactments Repeal. mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule:

Provided that this repeal shall not take effect in any part of His Majesty's dominions until this Act comes into operation in that part.

37. (1) This Act may be cited as the Copyright Act, 1911. Short title and commencement.

(2) This Act shall come into operation—

- (a) in the United Kingdom, on the first day of July, nineteen hundred and twelve or such earlier date as may be fixed by Order in Council;
- (b) in a self-governing dominion to which this Act extends, at such date as may be fixed by the Legislature of that dominion;
- (c) in the Channel Islands, at such date as may be fixed by the States of those Islands respectively;
- (d) in any other British possession to which this Act extends, on the proclamation thereof within the possession by the Governor.

SCHEDULES.

FIRST SCHEDULE.

SECTION 24.

EXISTING RIGHTS.

| Existing Right. | Substituted Right. |
|--|---|
| <i>(a) In the case of Works other than Dramatic and Musical Works.</i> | |
| Copyright | Copyright as defined by this Act.* |
| <i>(b) In the case of Musical and Dramatic Works.</i> | |
| Both copyright and performing right. | Copyright as defined by this Act.* |
| Copyright, but not performing right | Copyright as defined by this Act, except the sole right to perform the work or any substantial part thereof in public. |
| Performing right, but not copyright. | The sole right to perform the work in public, but none of the other rights comprised in copyright as defined by this Act. |

For the purposes of this Schedule the following expressions, where used in the first column thereof, have the following meanings :—

“Copyright,” in the case of a work which according to the law in force immediately before the commencement of this Act has not been published before that date and statutory copyright wherein depends on publication, includes the right at common law (if any) to restrain publication or other dealing with the work ;

“Performing right,” in the case of a work which has not been performed in public before the commencement of this Act, includes the right at common law (if any) to restrain the performance thereof in public.

* In the case of an essay, article, or portion forming part of and first published in a review, magazine, or other periodical or work of a like nature, the right shall be subject to any right of publishing the essay, article, or portion in a separate form to which the author is entitled at the commencement of this Act, or would, if this Act had not been passed, have become entitled under section eighteen of the Copyright Act, 1842.

SECOND SCHEDULE.
ENACTMENTS REPEALED.

Section 36

| Session and Chapter. | Short Title | Extent of Repeal. |
|-----------------------|--|---|
| 8 Geo. 2, c. 13 | The Engraving Copyright Act, 1734 | The whole Act. |
| 7 Geo. 3, c. 38 | The Engraving Copyright Act, 1767 | Ditto. |
| 15 Geo. 3, c. 53 | The Copyright Act, 1775 .. | Ditto. |
| 17 Geo. 3, c. 57 | The Prints Copyright Act, 1777 .. | Ditto. |
| 54 Geo 3, c. 56 | The Sculpture Copyright Act, 1814 | Ditto. |
| 3 & 4 Will. 4, c. 15. | The Dramatic Copyright Act, 1833 | Ditto. |
| 5 & 6 Will. 4, c. 65. | The Lectures Copyright Act, 1835 | Ditto. |
| 6 & 7 Will. 4, c. 59. | The Prints and Engravings Copyright (Ireland) Act, 1836. | Ditto. |
| 6 & 7 Will. 4, c. 110 | The Copyright Act, 1836 .. | Ditto. |
| 5 & 6 Vict., c. 45 | The Copyright Act, 1842 .. | Ditto. |
| 7 & 8 Vict., c. 12 | The International Copyright Act, 1844. | Ditto. |
| 10 & 11 Vict., c. 95. | The Colonial Copyright Act, 1847 | Ditto. |
| 15 & 16 Vict., c. 12. | The International Copyright Act, 1852. | Ditto. |
| 25 & 26 Vict., c. 68. | The Fine Arts Copyright Act, 1862 | Sections one to six. In section eight the words "and pursuant to any Act for the protection of copyright engravings," and "and in any such Act as aforesaid." Sections nine to twelve. |
| 38 & 39 Vict., c. 12. | The International Copyright Act, 1875, | The whole Act. |
| 39 & 40 Vict., c. 36. | The Customs Consolidation Act, 1876. | Section forty-two. from "Books wherein" to "such copyright will expire." Sections forty-four, forty-five and one hundred and fifty-two |

| Session and Chapter. | Short Title. | Extent of Repeal. |
|-----------------------|---|---|
| 45 & 46 Vict., c. 40. | The Copyright (Musical Compositions) Act, 1882. | The whole Act. |
| 49 & 50 Vict., c. 33. | The International Copyright Act, 1886. | Ditto. |
| 51 & 52 Vict., c. 17. | The Copyright (Musical Compositions) Act, 1888. | Ditto. |
| 52 & 53 Vict., c. 42. | The Revenue Act, 1889 | Section one, from "Books first published" to "as provided in that section." |
| 6 Edw. 7, c. 36 | The Musical Copyright Act, 1906 | In section three the words "and which has been registered in accordance with the provisions of the Copyright Act, 1842, or of the International Copyright Act, 1844, which registration may be effected notwithstanding anything in the International Copyright Act, 1886." |

REPEAL OF ENACTMENTS.

(See Section 15).

| Year. | No. | Short Title. | Extent of Repeal. |
|-------|------|--|---|
| 1847 | XX | The Indian Copyright Act, 1847. | So much as has not already been repealed. |
| 1867 | XXV | The Press and Registration of Books Act, 1867. | In section 18 the following words, namely:—"Every registration under this section shall, upon the payment of the sum of two rupees to the office keeping the said Catalogue, be deemed to be an entry in the Book of Registry kept under Act No. XX of 1847 (for the encouragement of learning in the territories subject to the government of the East India Company, by the defining and providing for the enforcement of the right called copyright therein); and the provisions contained in that Act as to the said Book of Registry shall apply <i>mutatis mutandis</i> to the said Catalogue." |
| 1878 | VIII | The Sea Customs Act, 1878 | Clause (a) of section 18. |

THE INDIAN COPYRIGHT REGULATIONS, 1914.

In exercise of the powers conferred by sections 3, 14 and 19 of the Copyright Act, 1911, as modified in its application to British India by the Indian Copyright Act, 1914, the Governor-General in Council is pleased to make the following Regulations:—

Preliminary.

Short title and application. 1. (1) These Regulations may be called the Indian Copyright Regulations, 1914.

(2) Regulations 1 to 11 apply to works first published in British India and to records, perforated rolls and other contrivances, the original plate of which was made in British India, and regulations 12 to 19 apply to copies of works the importation of copies of which into British India is prohibited by section 6 of the Indian Copyright Act, 1914.

Interpretation. 2. In these Regulations, unless there is anything repugnant in the subject or context.—

(1) "The Act" means the Copyright Act, 1911, as modified in its application to British India by the Indian Copyright Act, 1914.

(2) The expression "book or other printed work" means every part of or division of a book, pamphlet, sheet of letter-press, sheet of music, map, plan, chart or table separately published.

(3) "Form" means a form annexed to these regulations.

(4) The expression "owner of the copyright" includes the duly authorized agent of such owner.

(5) "Section" means a section of the Act.

Royalties.

Royalties to be ordinarily payable by adhesive labels. 3. (1) Unless otherwise agreed, royalties shall be payable by means of adhesive labels purchased from the owner of the copyright.

(2) After the person reproducing a work referred to in section 3 or making a contrivance referred to in section 19 has given the notice prescribed by these Regulations of his intention to reproduce the work or to make or sell the contrivance, the owner of the copyright shall, if the royalty is payable by means of adhesive labels, intimate to him, by registered post, some reasonably convenient place within British India from which adhesive labels can be obtained; and on demand in writing and tender of the price, shall supply from such place adhesive labels of the required denominations at a price equal to the amount of royalty represented thereby.

(3) The adhesive label supplied as aforesaid shall be an adhesive paper label, square in shape, the design to be entirely enclosed within a circle and the side of the label to be greater than $\frac{3}{4}$ inch in length. The label shall not bear the effigy of the Sovereign or any other person, nor any word, mark or design such as to suggest that the label is issued by or under the authority of the Government for the purpose of denoting any duty payable to the Government.

Labels to be affixed to copy or contrivance before delivery to purchaser. (4) Subject to these Regulations, when royalties are payable by means of adhesive labels no copy of any such work and no such contrivance shall be delivered to a purchaser until such label or labels denoting the amount of royalty have been affixed thereto:

Provided that in the case of cylinders, to which it is not reasonably practicable to affix the labels, the requirements of this regulation shall be deemed to be fulfilled if such label or labels have been affixed to a carton or box enclosing the cylinder.

Exception in certain cases when labels not available.

4. (1) When royalties are payable by means of adhesive labels, if at any time labels of the required denomination are not available either because—

- (a) after the expiration of one month from the date of the prescribed notice referred to in regulation 3 (2), the owner of the copyright has not duly sent to the person reproducing the work or making the contrivance, as the case may be, an intimation of some reasonably convenient place within British India from which such labels can be obtained; or
- (b) the owner of the copyright refuses or neglects to supply such labels within one month after demand duly made,

copies of the work or the contrivances, as the case may be, may be delivered to purchasers without having labels affixed thereto as required by regulation 3 (4), and the amount of royalties shall be a debt due from the person reproducing the work or making the contrivances, as the case may be, to the owner of the copyright, and the person aforesaid shall keep an account of all such copies or contrivances sold by him.

(2) For the purposes of this regulation "the date of the prescribed notice" means—

- (i) in cases where the notice is required to be sent by registered post, the date when the notice would in ordinary course of post be delivered;
- (ii) in cases where the notice is required to be advertised in the *Gazette of India* and in two newspapers published in British India, the date of such advertisement, or of the latest of such advertisements.

Payment of royalties when payable otherwise than by adhesive labels.

5. Where royalties are by agreement payable in any other mode than by means of adhesive labels, the time and frequency of the payment shall be such as are specified in the agreement.

Notices.

Notice required by section 3.

6. The notice required by section 3 shall contain the following particulars:—

- (a) the name and address of the person intending to produce the work,
- (b) the name of the work which it is intended to produce and (if necessary) a description sufficient to identify it,
- (c) the manner in which it is intended to reproduce the works (*e.g.* whether by printing, lithography, photography, etc.),
- (d) the price or prices at which it is intended to publish the work, and
- (e) the earliest date at which any of the copies will be delivered to a purchaser,

and shall be sent or advertised in the manner provided in regulation 8 not less than one month before any copies of the work are delivered to a purchaser.

Notice required by section 19(2).

7. (1) The notice required by section 19, sub-section (2), shall contain the following particulars:—

- (a) the name and address of the person intending to make the contrivances,
- (b) the name of the musical work which it is intended to reproduce and of the author (if known) and (if necessary) a description sufficient to identify the musical work,
- (c) the class of contrivance on which it is intended to reproduce the musical work (*e.g.* whether discs, cylinders or music rolls),
- (d) the ordinary retail selling prices of the contrivances and the amount of the royalty payable on each contrivance in respect of the musical work,
- (e) the earliest date at which any of the contrivances will be delivered to a purchaser, and
- (f) whether any other work is to be reproduced on the same contriv-

ance with the musical work specified in accordance with paragraph (b),

and shall be sent or advertised in the manner provided in regulation 8 not less than one month before any contrivances on which the musical work is reproduced are delivered to a purchaser :

Provided that any number of musical works may be included in the same advertisement,

(2) In cases where royalties are payable on contrivances made before the 30th day of October 1912, being the commencement in British India of the Copyright Act, 1911, the person making such contrivances may give notice of his intention to sell them, containing *mutatis mutandis* the same particulars and given in the same manner as is prescribed by these Regulations in the case of the notice required by section 19, sub-section (2)

(3) The ordinary retail selling price of any contrivance shall be calculated at the marked or catalogued selling price of single copies to the public or, if there is no such marked or catalogued selling price at the highest price at which single copies are ordinarily sold to the public : and one half anna shall be deemed to be the equivalent of one half penny and one quarter anna of one farthing.

Service and advertisement of notices. 8. The notices referred to in the two last foregoing regulations shall be sent by registered post or advertised as follows :—

- (a) if the name and an address within British India of the owner of the copyright are known or can with reasonable diligence be ascertained, the notice shall be sent to him at such address ;
- (b) if such name and address are not known and cannot with reasonable diligence be ascertained the notice shall be advertised in the *Gazette of India* and in two newspapers published in British

India ; such advertisements shall give the particulars required by paragraphs (a) and (b) of regulation 6 or regulation 7, as the case may be, and shall also state an address from which a copy of the notice may be obtained.

Inquiries.

9. The inquiries referred to in section 19, sub-section (5), shall be directed to the owner of the copyright by name or (if his name is not known and cannot with reasonable diligence be ascertained) in general terms to “ the owner of the copyright ” of the musical work in respect of which the inquiries are made, and shall contain—

- (a) a statement of the name of the musical work in respect of which the inquiries are made and of the author (if known) and (if necessary) a description sufficient to identify it ;
- (b) a statement of the name, address and occupation of the person making the inquiries ;
- (c) an allegation that a contrivance has previously been made by means of which the musical work may be mechanically performed, with the trade name (if known) and a description of such contrivance ; and
- (d) an inquiry whether the contrivance so described was made with the consent or acquiescence of the owner of the copyright.

Service and advertisement of inquiries. 10. The inquiries shall be sent by registered post or advertised as follows :—

- (a) if an address within British India of the owner of the copyright is known or can with reasonable diligence be ascertained, the inquiries shall be sent to such address ; or
- (b) if such address is not known and cannot with reasonable diligence be ascertained, the inquiries shall be advertised in the *Gazette of India* and in two newspapers published in British India.

Prescribed time for reply to inquiries. 11. The prescribed time for reply to such inquiries shall be—

- (a) in cases where the inquiries are required to be sent by registered post, one month after the date when the inquiries would in ordinary course of post be delivered ;
- (b) in cases where the inquiries are required to be advertised in the *Gazette of India* and in two newspapers published in British India, one month after the date of such advertisement or of the latest of such advertisements.

Importation of Copies.

12 The notice to be given to the Chief Customs officer under section 6 of the Indian Copyright Act, 1914, requesting that copies of any book or other printed work printed or reprinted out of British India, shall not be imported into British India, shall be in Form No. 1 or as near thereto as circumstances permit.

13. The notice to be given to the Chief Customs officer under section 6 of the Indian Copyright Act, 1914, requesting that copies of any work made out of British India other than a book or other printed work, shall not be imported into British India, shall be either in Form No. 2, or in Form No. 3, or as near thereto as circumstances permit.

14. Any notice given under section 14, sub-section (1), of the Copyright Act, 1911, to the Commissioners of Customs and Excise of the United Kingdom, and communicated by that authority through the Governor-General in Council or the Local Government to the Chief Customs officer, shall be deemed to have been given to such officer by the owner of the copyright

15. Before any article is detained as a copy of a work to which any such notice as aforesaid applies or any further proceedings with a view to the confiscation thereof under the law relating to the Customs are taken, the Chief Customs officer may require the owner of the copyright—

- (a) to give him in writing such further information as such officer may consider necessary to satisfy himself that the article in question is liable to detention and confiscation, and such person shall be bound to give such information accordingly, and
- (b) to verify the information contained in the notice or given under clause (a) by an affidavit.

16. Whenever any goods are detained in pursuance of a notice in Form No. 3, the Chief Customs officer may require the owner of the copyright to deposit with him as security a sum of money sufficient, in the opinion of such officer, to cover any expenses which may be incurred in the examination required by reason of the notice.

17 Whenever any goods are detained in pursuance of any notice given under these Regulations, the Chief Customs officer may require the owner of the copyright—

- (a) to give an undertaking in writing to reimburse the Secretary of State for India in Council all expenses and damages incurred in respect of the detention and of any proceedings for confiscation subsequently taken, if such an undertaking has not already been given, and
- (b) within four days after the detention to enter into a bond for such reimbursement, with two approved sureties, in such form and for such amount as the Chief Customs officer may require,

Provided that, on the completion of such bond, any money previously deposited under regulation 16 shall be returned.

18 If upon the examination of goods detained under these Regulations, the Chief Customs officer is satisfied that there is no ground for their detention, he may order them to be delivered.

19. Any notice in regard to any book in which copyright subsisted on the 24th February 1914, which was given to and accepted by the Chief Customs Authority on or before that date under section 18 (a) of the Sea Customs Act, 1878, shall, so long as the copyright subsists, be treated as a notice given under section 6 of the Indian Copyright Act, 1914, unless the notice is withdrawn or superseded ;

Provided that the Chief Customs officer may require the owner of the copyright to give a fresh notice in accordance with these Regulations, or to comply with any of the provisions of these Regulations, regarding further information, verification, or security; and from such date as the Chief Customs officer may, by such requisition, fix in this behalf, the notice given under section 18 (a) of the Sea Customs Act, 1878, shall be deemed void and of no effect.

FORM NO. 1.

NOTICE.

RELATING TO IMPORTATION OF COPYRIGHT BOOKS AND OTHER PRINTED WORKS.

TO THE CHIEF CUSTOMS OFFICER,

I _____ of _____ hereby give you notice that copyright in the original work (1) _____ mentioned in the Schedule hereto now subsists under the Copyright Act, 1911, as modified by the Indian Copyright Act, 1914, and that (2) _____ the owner of the copyright in the said work (1) _____ and that (3) _____ desirous that copies of the said work (1) _____ printed or reprinted out of British India, shall not be imported into British India.

Dated this _____ day of _____ 19 .

(Signature) _____

(4)

Schedule.

Title of book (5) _____

Description of printed work, if not a book _____

Full name of author or authors _____

Whether author or authors alive, if not, date of death _____

When and where (6) book or printed work first published _____

(1) or works.

(2) If notice is given by the owner insert "I am." If given by an agent insert the name of owner and the word "is."

(3) "I am" or "he is."

(4) If an agent insert "Agent of owner."

(5) The notice may apply to a number of books or printed works in which case the particulars in the Schedule must be given as respects each book or printed work.

(6) It is sufficient to state the country of first publication.

Note.—Where advantage has been taken of the provisions of the Copyright Act, 1911, as modified by the Indian Copyright Act, 1914, as to simultaneous publication the date and place stated should be those which entitle the work to Copyright in British India.

FORM NO. 2.

NOTICE.

RELATING TO IMPORTATION OF COPYRIGHT WORKS, OTHER THAN BOOKS
OR OTHER PRINTED WORKS.

TO THE CHIEF CUSTOMS OFFICER.

I _____
of _____
hereby give you notice that copyright in the original work mentioned
in the Schedule hereto now subsists under the Copyright Act, 1911, as
modified by the Indian Copyright Act, 1914, and that (1) _____
the owner of the copyright in the said work,
and that (2) _____ desirous that copies of the said work made
out of British India, shall not be imported into British India.

Dated the _____ day of _____ 19 ____.

(Signature) _____
(3) _____

Schedule.

Title of work (if any) _____
Full description of work _____
Initials or marks (if any) usually placed on copies of work _____
Full name of author or authors _____
Whether author or authors alive, if not, date of death _____
When and where (4) work first published _____
If work not published—

Whether author British subject or not _____
If not a British subject, name of country in which author was a resident
or domiciled at date of the making of work _____
In the case of photographs, phonographic records and music rolls, date
of making the original negative or original plate _____

(1) If notice given by the owner insert "I am." If given by an agent
insert name of owner and the word "is"

(2) "I am" or "he is"

(3) If an agent insert "Agent of owner."

(4) It is sufficient to state the *country* of the first publication.

(Note.—Where advantage has been taken of the provisions of the Copy-
right Act, 1911, as modified by the Indian Copyright Act, 1914, as to
simultaneous publication, the date and place stated should be those which
entitle the work to copyright in British India.)

FORM NO. 3.

NOTICE.

RELATING TO A PARTICULAR IMPORTATION.

TO THE CHIEF CUSTOMS OFFICER,

I _____ of _____
hereby give you notice that I am the owner (1) _____
_____ of the copyright in a certain original work as to

(1) or agent for the owner.

which copyright now subsists under the Copyright Act, 1911, as modified by the Indian Copyright Act, 1914, and that the undermentioned goods, that is to say, (1) _____

_____ are about to be imported into British India through the port of _____ on or about the _____ day of _____ next in the (2) _____ from _____

That such goods are liable to detention and confiscation as being (3) _____

And I request that the said goods may be detained and dealt with accordingly

And I hereby undertake to reimburse the Secretary of State for India in Council all expenses and damages to be incurred in respect of the detention, and of any proceedings for confiscation which may be subsequently taken.

Dated this _____ day of _____

(Signature) _____
* (4) _____

(1) Describe the goods, number of packages, marks used, and any other particulars necessary for their identification.

(2) Describe the ship and give name or indication.

(3) State if the goods are copies of the original work made out of British India, or how otherwise the goods are liable to detention and confiscation.

(4) If an agent insert "Agent of owner."

LECTURE VII.

THE LAW OF COPYRIGHT—(continued).

The Consolidating Act of 1911, and the Indian Act.

Decisions under the repealed Acts still referred to for construction of the new statute.

Originality.

As already stated the Consolidating Act of 1911 which the Indian Act (Act III of 1914) adopts with a few necessary additions and alterations, mainly as to procedure,¹ repeals about twenty different statutes covering different branches of copyright law. It does not follow that the decisions under the repealed Acts have become unserviceable. Not only is there ample room for reference to the old decisions, but in certain cases they are essential for the purpose of understanding the law as it stands. In this connection, it is useful to remember the well-known and oft-quoted dictum of Mr. Justice Blackburn in the *Mersey Dock Case*.² "Where an Act of Parliament has received a judicial construction putting a certain meaning on its words, and the Legislature in a subsequent Act *in pari materia* uses the same words, there is a presumption that the Legislature used those words intending to express the meaning which it knew had been put upon the same words before; and, unless there is something to rebut the presumption, the Act should be so construed, even if the words were such that they might originally have been construed otherwise." There are some things which the Act does not expressly provide for, there are others which appear doubtful; and in all these matters the help derived from the decided cases is invaluable, and must be sought for purposes of accurate understanding and exposition.

Take, for instance, the question of originality. Not every production can claim copyright. In order to acquire copyright it is necessary that the work should be original. Section I, schedule I, of the Indian Copyright Act provides *inter alia* that copyright shall subsist throughout the parts of His Majesty's dominions to which the Act extends, in every *original*

¹ The Indian Copyright Act (Act III of 1914) consists of 15 Sections, which indicate the necessary additions and modifications, and two schedules, of which the first schedule sets out the Act of 1911 (1 & 2 Geo. V.c. 46) with the exception of a few sections.

² 11 H.L.C. at p. 480.

literary, dramatic, musical and artistic work if, in the case of a published work, the work was first published within the parts of His Majesty's dominions above referred to and, in the case of an unpublished work, the author was at the date of making the work a British subject resident within such parts of His Majesty's dominions as aforesaid. The Copyright Act says nothing as to what is to be understood by 'originality.' We have to look into the decided cases for light on this subject. A literary work of an original character has been defined in *Spiers v. Brown* as "being a work of imagination or invention on the part of the author, or original in respect of its being a work treating of a subject common to mankind, such as history or other branches of knowledge, varying much in their mode of treatment in which the hand of the artist will be readily discerned."¹ In that case, a compiler of a dictionary was held to have used another, but to have bestowed such individual effort and independent labour upon it as to make it 'original' within the meaning of the law. The defendant had struck out an enormous quantity of the plaintiff's meanings. It was held that the mere striking out of a certain quantity of the plaintiff's words would not necessarily make it original. If that was all he had done, a case of piracy would perhaps have been made out. But it was found that the defendant had bestowed mental work upon the compilation sufficient in the eye of law to make the work his own. In *Dicks v. Yates*² the same point arose, though in another form, and the judgment put the subject in a fresh light. "The matter must be original, it must be a composition of the author, something which has grown up in his mind, the product of something which, if it were applied to patent rights, would be called 'invention.'" Originality, or for that matter, novelty must not be

¹ *Spiers v. Brown* (1858) 6 W.R. 352; *per* Wood V.C. "Literary work," under the present Act, "includes maps, charts, plans, tables and compilations" (Sch I, sec. 35.) In *University of London Press Ltd. v. University Tutorial Press Ltd.* (1916) L.R. 2 Ch 601, it has been held that papers set by examiners are 'original literary work' within the meaning of the Copyright Act." This case is also of assistance on another point; it explains under what circumstances an author may be regarded as being "in the employment of some other person under a contract of service," within the meaning of Section 5, sub-section (1) (b).

² 18 Ch. D. 76 at p. 92.

'Originality' or
'novelty' must
not be understood
in too strict a
sense.

understood, however, in too strict a sense. If a strict standard is applied, hardly anything can be called absolutely new or original in literature, art, or artistic craftsmanship. Every age inherits the acquisition of its predecessor or predecessors. "Knowledge grows from more to more," to be sure. But that does not mean that every addition to our knowledge must consist of an item entirely new, and unknown to the past. The majority of intellectual and artistic productions is obtained by an employment of the materials already at our disposal, and the skill and originality of the author consists in utilising materials accessible to all and casting them, as it were, into a new mould. Thus he imposes a new form on old materials and sends forth his creation to the world with the stamp of his own mind on it. Should any one afterwards slavishly copy it, he would at once be open to the charge of piracy or plagiarism. It is then and then only that the right of the author is infringed. Looked at in this light, originality or novelty appears to have a wider denotation. Thus we find that even a street directory may be the subject-matter of copyright. In the case of *Kelly v. Morris*¹ it was found that the Imperial Directory of London was a copy of the Post Office London Directory, in as much as it had involved no independent labour or research. "In the case of a dictionary, map,² guide book, or directory, when there are certain common objects of information, which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In case of a road-book, he must count the mile-stones himself. In the case of a map of a newly discovered island, he must go through the whole process of triangulation, just as if he had never seen any former map, and, generally, he is not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use that he can legitimately make of a previous publi-

¹ (1866) L.R. 1 Eq. 697.

² Maps, tables, charts and plans are protected as literary works. See Sch. I, sec. 35 (1).

cation is to verify his own calculations and results when obtained.”¹ It must be observed that mere likeness or resemblance in the results obtained does not necessarily show that the one has been copied from the other. There may be accidental coincidence, specially having regard to the fact that the same materials may be available to both. Where authors have written upon the same subject, and have derived their information from common sources, it is necessary in order to prove infringement to show that substantial passages from the plaintiff's work have been actually copied, or copied with mere colourable alterations.² The case of *Gangabishun Srikisondas v. Moreshwar Bapuji Hegishthe and others*³ illustrates very clearly what constitutes piracy and what not. In that case, the plaintiff a book-seller brought out a new and annotated edition of a certain well-known Sanskrit work on religious observances entitled “Vritraj” having for the purpose obtained the assistance of Pundits, who recast and re-arranged the work, introduced various passages from other old Sanskrit books on the same subject and added footnotes. The defendants printed

Mere likeness or resemblance, not enough to constitute infringement

¹ *Kelly v. Morris* (1866) L.R. 1 Eq. 697 at p. 701-2. The same idea is expressed in another judgment thus:—“Whilst all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense, by availing themselves, for their own profit, of other men's works, still subject to copyright and entitled to protection” *Per Langdale M.R. in Lewis v. Fullerton* (1839) 2 Beav. 6 at p. 8, s.c. 48 Eng. Rep. p. 1080. In *Scott v. Stanford* statistical returns formed the subject-matter of the alleged infringement. It was held that having regard to the quantity and matter of the information which had been taken and republished without the exercise of any independent thought and labour and the prejudice to the plaintiff in having the sale of his work superseded by this re-publication in a cheap form of his labours, he was entitled to an injunction. “Mere honest intention,” said Sir W. Page Wood V.C., “on the part of the appropriator will not suffice, as the court can only look at the result and not the intention in the man's mind at the time of doing the act complained of, and he must be presumed to intend all that the publication of his work effects (*Scott v. Stanford* L.R. 3 Eq. p. 718, at p. 723). See also in this connection *Morris v. Ashbee* (L.R. 7 Eq. 34) concerning copyright in paid-for insertion in a Directory; *Cox v. Land & Water Journal Co.* (L.R. 9 Eq. 324) concerning copyright in contents of newspapers; *H. Blacklock & Co., Ltd. v. Arthur Pearson Ltd* (1915) L.R. 2 Ch. 376, concerning compilation of current time tables of Railways; *Cobbett v. Woodward* (L.R. 14 Eq. 407) concerning copyright in descriptive advertisements; *Lawrence v. Bushnell* L.L.R. 35 Cal. 463, s.c. 12 C.W.N. 753, concerning copyright in illustrations contained in a catalogue; *Grace v. Newman* (L.R. 19 Eq. 623) concerning copyright in a book of designs in the nature of an advertising catalogue; also *Petty v. Taylor* (1897) 1 Ch. 465 in which *Grace v. Newman* was distinguished.

² *Pike v. Nicholas* (1869) 5 Ch. App. 251. See also *Jarold v. Houlston* (1857) 3 K. & J. 708; s.c. 69 Eng. Rep. 1294.

³ L.L.R. 13 Bom. 358.

and published an edition of the same work, the text of which was identical with that of the plaintiff's work and which, moreover, contained the same additional passages and the same footnotes, at the same places, with many slight differences. The plaintiff asked for an injunction alleging that his copyright had been infringed. It was held that the plaintiff's work was such a new arrangement of old matter as to be an original work and, therefore, entitled to protection; that the defendants had not gone to independent sources for their material but had simply appropriated the labour and industry of a previous compiler (the plaintiff) who had an existing copyright therein, and they had, therefore, pirated the plaintiff's work, and must be restrained by injunction. Where, however, there is no original matter in the work alleged to be copied, the strongest evidence of servile imitation and piracy must be afforded before an action for an infringement of copyright can be successful.¹

New arrangement
of old matter can
make a work
'original.'

Walter v. Lane.

The case of *Walter v. Lane*² which went up to the House of Lords elucidates the notion of originality, as understood by the law, in a very striking manner. The defendant in that case published a book entitled "Appreciations and Addresses delivered by Lord Rosebery." It contained practically *verbatim* copies of the reports of five speeches delivered by Lord Rosebery. The reports of these speeches had appeared in the columns of the *Times*, having first been taken down *verbatim* at the meetings where they had been delivered, by the *Times* reporters in shorthand. The proprietors of the *Times* sued the defendants for infringement of copyright. It appeared on the admission of the defendant himself that in preparing his work he had utilised cuttings from the *Times*, and four of the speeches appeared to have been taken down bodily from it. Lord Rosebery made no claim to copyright. The plaintiff obtained an injunction restraining the defendant from further publishing any book containing copies of the speeches. On appeal, the decision was reversed, the Court of Appeal holding that the Copyright Act was passed to protect

¹ *Roussac v. Thacker & Co.* 1 Hyde 9. See also *Giridhari Lall v. Devi* Dial 3 I.C. 497.

² (1899) 2 Ch. 749.

authors, not reporters, and that short-hand reporters are not authors. "No doubt," said the Court, "it requires considerable education and ability to make a good report of any speech. But an accurate report is not an original composition, nor is the reporter of a speech the author of what he reports."¹ The plaintiff appealed to the House of Lords where the decision of the Court of Appeal was again reversed. In his judgment Lord Halsbury L.C. observed: "The producer of this written composition is, to my mind, the person who is the author of the book within the meaning of the statute, and, as I have pointed out, the words 'original composer' are not to be found in the statute at all,² and, as I understand, the judgment of the Court of Appeal is entirely based on the thing protected being an original composition in the sense that the person who claims the protection of the statute must not have obtained his words or his ideas from somebody else, but must be himself an original author in the sense in which that word is generally used in respect of literary composition."³ The principle upon which the decision of the House of Lords went is well expressed in the following words which fell from Davey, L.J.: "It is a sound principle that a man shall not avail himself of another's skill, labour and expense by copying the written product of it."⁴ In other words, the reporter had expended his skill and labour in 'reporting,' i.e. reducing to writing Lord Rosebery's speeches delivered orally in public, and thereby had made the report his own original composition.⁵ There is another matter which this case clears up, and that is the question as to whether originality, according to the law of copyright, imports any particular merit or excellence. In the words of the Lord Chancellor, copyright "is given by the statute to the first producer of a book, whether that book be wise

Does 'originality' imply any particular merit or excellence in the work?

¹ (1899) 2 Cf. at p 792.

² The word 'original' did not appear in the Copyright Act of (1842) (5 & 6 Vict. C. 45). It should be noted that Sec. 1 of the Copyright Act 1911 removes the defect and expressly provides that only original works are to be entitled to copyright.

³ (1900) A.C. 546, 547.

⁴ *Ibid.*, at p 552.

⁵ Thus it appears that the report of a stenographer, as in the case of *Waller v. Lane*, made to-day would be entitled to copyright under the Indian Copyright Act of 1914, as being an 'original composition.'

or foolish, accurate or inaccurate, of literary merit or of no merit whatever.”¹ It does not follow from this that every kind of miscellaneous matter can be allowed to be the subject-matter of copyright. For instance, it has been held that an album for holding photographs with pictorial borders containing views of castles with short descriptions attached is not a literary composition, within the meaning of the law of copyright.² A production consisting of an envelope on the outside of which a title was printed and a piece of cardboard so cut that held up in the light it cast a shadow of a well-known picture “*Ecce Homo*” together with a slip of paper containing a verse from Longfellow, has been held not to be a literary work.³ Similarly, sporting tips in the shape of a list of horses expected to win at the races were held not to come within the purview of the law.⁴ Other examples of such exclusion are specifications of patents,⁵ or a particular method of ruling a book for scoring purposes.⁶ On the other hand, the author of a mining report has been held to have copyright therein⁷ and a code of made up words suitable for cabling purposes has been held to be an “original literary work within the meaning of the Copyright Act.”⁸

Copyright in the name or title of a book.

The name or title of a book is not the subject-matter of copyright, unless, in form and language it constitutes a literary composition of the author.⁹ On principle this statement seems quite sound. But the decisions are rather conflicting, and there seems to have been some confusion on the subject. Thus in *Weldon v. Dicks*¹⁰ Malins V.C. held that the title of a book is a part of the book and as such the subject of copyright, as the book itself. This seems also to have

¹ (1900) A.C. at p. 549. See also *Hollinrake v. Truswell* (1894) 3 Ch. 420.

² *Schove v. Schmincke* 33 Ch. D. 546.

³ *Cable v. Marks* (1882) 52 L.J. Ch. 107. Though a book containing sketches of monumental designs with scarcely any letter press was held to be the subject of copyright *Grace v. Newman*, L.R. 19 Eq. 623.

⁴ *Chilton v. Progress Printing and Publishing Company* (1895) 2 Ch. 29.

⁵ *Wyatt v. Bernard* (1814) 3 Ves. & B. 77; s.c. 35 Eng. Rep. 408.

⁶ *Page v. Wisden* (1869) 20 L.T. 435.

⁷ *Kenrick v. Danube Collieries and Minerals Co., Ltd.* (1891) 39 W.R. 473.

⁸ *D. P. Anderson & Co., Ltd. v. The Lieber Code Co.* (1917) L.R. 2 K.B. 469.

⁹ See Halsbury's Laws of England, Vol. VIII, p. 143.

¹⁰ (1872) 10 Ch. D. 247.

been the opinion of the court in *Mack. v. Petter*¹ where a work called 'The Birthday Scripture Text-Book' was protected against a colourable imitation styled 'Children's Birthday Text-Book.' Evidently, however, the decision was not based on the principle of copyright. A title might be a sort of trademark, and thus might be the subject of a "passing off" action (see *infra*, Lect. VIII), i.e. an action brought against a person for fraudulently inducing the public to believe that they were buying the work of another. The decision in *Weldon v. Dicks* was considered and criticised in that light by the Court of Appeal in *Dicks v. Yates*², Jessel M.R. observing that there might be copyright where there was "a whole page of title or something of that kind requiring invention." Similarly, it was held in the *Licensed Victualler's Newspaper Co. v. Bingham*³ that there is no copyright in the name of a newspaper or periodical, but the adoption of the name by another newspaper may be restrained on the ground of being misleading to purchasers (passing off). The adoption of a *nom-de-plume* which is associated with a particular author may be restrained on the same ground, and not on the ground of copyright.⁴ In *Hogg. v. Kirby*⁵ the defendant published a magazine as a continuation of the plaintiff's magazine in numbers. An injunction was issued restraining him from doing so, making it clear that it was to operate upon nothing but the publication handed out to the world as the continuation of the plaintiff's work.

Copyright in private letters is again a subject on which the old rulings are of considerable help. The question as to the application of copyright to private letters was first judicially considered in England in the case of *Pope v. Curl* about the year 1741. In that case an injunction was granted against a re-publication of the poet Pope's private letters to Dean Swift, and Lord Hardwicke C. observed: "Objection has been made by defendant's counsel, that where a man writes a letter, it is in the nature of a gift to the receiver. But I am of opinion that it is only a special property in the receiver, possibly the property of the paper

¹ (1872) L.R. 14 Eq. 431. ² (1881) 18 Ch. D. 76 C.A.

³ (1888) 38 Ch. D. 139. ⁴ *Land v. Greenbery* (1908) 24 T.L.R. 441.

⁵ 8 Vesey Jun 215; s.c. 32 Eng. Rep. 336 at p. 340.

may belong to him; but this does not give a licence to any person whatsoever to publish them to the world, for at most the receiver has only a joint property with the writer.¹ In the more modern case of *Percival v. Phipps*² several kindred questions in connection with private letters came up for discussion and they were well summed up by Sir Thomas Plumer V.C. who observed that "letters had the character of literary composition stamped upon them, so that they were within the spirit of the Act of Parliament protecting literary property; and a violation of the right in that instance is attended with the same consequences as in the case of an unpublished manuscript of an original composition of any other description"; thus obviously inclining to hold that an injunction restraining the publication of private letters must stand upon the foundation of literary property, not of breach of confidence. In the case of *Gee v. Pritchard*³ Lord Eldon C. restrained the publication of private letters written and sent by a lady to her husband's adopted son, and observed that he believed he was bound so to do by the law (although he doubted its soundness) laid down in similar cases in the Court of Chancery, 'that the receiver of a letter had only a joint property with the writer.' Lord Eldon's decision in that case has received the approval of Mr. Justice Story, the learned American commentator on Equity Jurisprudence. It has, however, been remarked by an American Chancellor,⁴ that Lord Eldon in that case perhaps endangered to some extent the freedom of the press by assuming jurisdiction of the case as a matter of property only, whereas in fact the object which the lady had in view was not so much to prevent the publication of her letters on the ground of any proprietary interest in them, but rather as a matter of sentiment in as much as it invaded her right to privacy. In this connection it is profitable to refer to the observations of Buckley L.J. in *Macmillan & Co. v. Dent*:⁵ "We have been pressed with a metaphysical distinc-

¹ 2 Atk. 342, s.c. 26 Eng. Rep. 608; referred to in *Macmillan & Co. v. Dent* (1907) 1 Ch. 107.

² 2 V. & B. 19 at p. 24; s.c. 35 Eng. Rep. 225 at p 227.

³ 2 Swanst 402; s.c. 36 Eng. Rep. 670.

⁴ See *Brandeth v. Lance* 8 Paige 2, 8.

⁵ (1907) 1 Ch. 107 at pp. 128-129.

tion which it has been sought to draw between the author's manuscript in the sense of the sheets of paper with words written upon them and the literary composition whose expression is found in those written words. It has been argued that the author's manuscript means the abstract thing, that is, the literary composition, as distinguished from the concrete thing, meaning the expression of that literary composition in characters upon paper. I agree that there exists in an author a right of property in the literary composition, the abstract thing, as distinguished from the concrete thing, the words written upon the paper. The decision of Lord Hardwicke in *Pope v. Curl* as understood and explained by Sir Thomas Plummer in *Lord Percival v. Phipps* rests no doubt upon this, that as between the writer and the addressee of a letter, notwithstanding the fact that the latter is entitled to the letter, meaning the paper on which it is written, yet the writer has a right of property in the letter based upon his right as composer. The writer retains the rights flowing from authorship. He does not by sending the letter to the addressee authorize him to publish it. As Lord Cairns said in *Hopkinson v. Burghley*,¹ the writer is supposed to intend that the receiver may use it for any lawful purpose, but publication is not such a lawful purpose." It is instructive to consider the facts in the case of *Phillip v. Pennell*.² A biography of Whistler was in course of preparation and had been authorised by him. No express authority had, however, been granted to publish any letter. The writers of the biography were held entitled to use, for the purpose of compiling the biography, the information contained in letters or documents written by Whistler, when they had lawfully come into their possession without any express or implied authority; but they were not entitled to publish the letters or extracts from them. Lastly, the question of letters which have not been published during the life-time of the author remains to be

¹ (1867) 2 Ch App. 447. It was held in this case that a private and confidential letter ought to be published in a court of law if required for purposes of justice; but the defendant would be justified in refusing to produce the letters without the direction of the Court.

² (1907) 2 Ch. 577.

considered. They are on the same footing as posthumous works under the present Act, and copyright in them subsists until publication and for a term of fifty years thereafter.

Selection of poems,
whether can be the
subject-matter of
copyright.

The question as to whether a selection of poems, etc., might be the subject-matter of copyright came up in the case of *Macmillian v. Suresh Chandra Deb*,¹ and it was held that it came within the operation of the same principle which made maps, road-books, guide-books, street directories, dictionaries and compilations the subject-matter of copyright. Wilson J. in the course of his judgment in that case observed: "There has not, so far as I know, been any actual decision upon the question. In the case of works not original in the proper sense of the term, but composed of and compiled or prepared from materials which are open to all, the fact that one man has produced such a work does not take away from any one else the right to produce another work of the same kind and in doing so to use all the materials open to him. But as the law is concisely stated by Hall, V.C., in *Hogg v. Scott*² 'the true principle in all these cases is, that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at for the purpose of producing his work, that is, in fact, merely to take away the result of another man's labour, or, in other words, his property' . . . This principle seems to me clearly applicable to the case of a selection of poems."³

Copyright in
Abridgments.

On the subject of abridgments the law, I apprehend, has been substantially changed by the present Act. Under the old law, abridgments came under the general principle above referred to, viz. if the abridgment or epitome is such as to show that independent labour has been bestowed upon it then, and in that case only, was it allowable. But an unintelligent use of scissors and paste whereby some passages are cut out and others retained, thus merely reducing the size of the book, is not in the proper sense of the term an abridgment. Thus in *Newberry's case*⁴ it was held

¹ I.L.R. 17 Cal. 951. See also *Mad. Abdul Jalil v. Ram Dayal and others* I.L.R. 35 All. 484; 34 I.C. 357.

² L.R. 18 Eq. 444, at p. 458.

³ I.L.R. 17 Cal at p. 961.

⁴ Lofts Rep. 775.

that "to constitute a true and proper abridgment of a work the whole must be preserved in its sense and then the act of abridgment is an act of the understanding employed in carrying a large work into a smaller compass." Again, in *D'Almaine v. Boosey* the question was discussed and the observations of Abinger L.C.B. in that case are well worth quoting: "It is a nice question," says he, "what shall be deemed such a modification of an original work as shall absorb the merit of the original in the new composition. No doubt such a modification may be allowed in some cases, as in that of an abridgment or a digest. Such publications are in their nature original. Their compiler intends to make of them a new use; not that which the author proposed to make It must be a bonafide abridgment because if it contains many chapters of the original work, or such as made that work most saleable, the maker of the abridgment commits a piracy.¹ Such was the law before the Copyright Act of 1914. According to sec. 1; sch. I of the present Act "Copyright means the sole right to produce or reproduce the work, or any substantial part thereof in any material form whatsoever." It seems to me that in the case of any abridgment of a work an infringement of this right of the author is almost unavoidable. The only exception that is made is to be found in sec. 2, sub-section (i) which provides that any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary shall not constitute an infringement of copyright.

A digest is on a different footing from an abridgment. An abridgment properly speaking is a condensation of the work of the author, keeping intact the general plan and arrangement. If the latter is not retained, it would scarcely be a faithful abridgment. A digest, on the other hand, is a compilation consisting of extracts selected from different authors irrespective of the arrangement and plan of the work from which the extracts are selected. Nevertheless, a digest will constitute an infringe-

Copyright in
Digests.

¹ (1835) 1 Y. & C. Ex. 288 at p. 301; s.c. 160 Eng. Rep. 117. See also *Gyles v. Wilcox* (1740) 2 Atk. p. 14; s.c. 26 Eng. Rep. 489.

ment if it contains a substantial reproduction sufficient to impair the value of the original work. Take the special case of 'Law Digests.' There is undoubtedly copyright in a summary of legal proceedings or in the form in which the principles of a judgment are expressed in the head-note of a reported case.¹ The right of selecting passages from books of report and even entire judgments in treatises of law is recognised. If this were not allowed, many valuable works which are in existence at the present day would be impossible. Further, any number of persons may take down or obtain copies of judgments, and publish them without copying from each other. In America, there is no copyright in the written judgment delivered by a court. The Supreme Court of the United States has held that neither a judge nor the State has copyright in judgments.² The question of copyright in India in judgments and selections of judgments was thoroughly discussed in the case of *Jogesh Chandra Chaudhuri v. Mohim Chandra Rai*³, in which the plaintiff, the proprietor and editor of the law weekly known as the *Calcutta Weekly Notes*, sued the editor and publisher of a rival law periodical known as the *Calcutta Case Law*, and complained that the defendant had systematically pirated reports from the *Calcutta Weekly Notes* and printed and published the same in the *Calcutta Case Law*. The defendant maintained that the plaintiff had no copyright in the report of judgments of any courts of law and denied the alleged piracy. In delivering judgment for the plaintiff Imam J. observed: "It is generally true that in the reports of judgments, the reporter has no copyright, but it cannot be said that in the selection of cases, and in the arrangement of the reporting, the reporter has not the protection of the law. The defendant is entitled to report such

¹ "The head-note, or the side or marginal note of a report is a thing upon which much skill and exercise of thought is required to express in clear and concise language the principles of law to be deduced from the decision to which it is prefixed or the facts and circumstances which bring the case in hand within the same principle or rule of law or of practice." *Per Crowder J. in Sweet v. Benning* (1855) 16 C.B. 459, at p. 491 s.c. 139 Eng., Rep. 838.

² See *Bank v. Manchester* (1888) 21 Davis 244, cited in *Robinson's Law of Copyright*

³ 18 C.W. N. 1078 at p. 1085; 26 I.C. 30

judgment as he obtains by expenditure of his time, labour and money, but where he fails to exert his own energies, he cannot be allowed to avail himself of other people's industry. The contesting defendant, instead of restricting himself to reporting the judgments only, has gone much further. What he has done in the present case is that he has freely drawn on such portions of the plaintiff's reports as form no part of the judgment. He has also taken from the plaintiff's reports the quotations from judgment that were appropriate to the reports. The plaintiff's reports in many instances contain statements of facts not to be found in the judgment but have been gathered by the reporter from the records of the cases. The defendant no doubt was at liberty to bestow his labour on collecting the facts for himself but he was not entitled to avail himself of the labours of another." The latter part of the passage is based upon the principle laid down in *Lewis v. Fullarton*¹ already referred to.

To pass on for a moment to consider the law of copyright with regard to lectures. The Act provides that the lecturer shall have copyright in his lecture and the copyright includes "the sole right to deliver (it) or any substantial part thereof in public".² It is necessary, however, to remember the general exceptions laid down in sec. 2, sub-secs. (i), and (iv) of sch. I, which are applicable to lectures as well. It is provided that any fair dealing with any work, including a lecture, for the purposes of private study, research, criticism, review or newspaper summary shall not constitute an infringement of copyright. Secondly, the publication in a collection mainly composed of non-copyright matter, *bona fide* intended for the use of schools (and so described in the title and in any advertisements issued by the publisher) of short passages from published literary works (including lectures), not themselves published for the use of schools, in which copyright subsist, is allowable, provided that not more than two of such passages from works by the same author are published by the same publisher within five years and that the source from which such

¹ 2 Beav 6, s.c. 48 Eng. Rep. 1080.

² Sec. 1, sub-sec. (2). Sch. I, sec. 35, sub-sec. (1), says, "Lecture includes address, speech and sermon."

passages are taken is acknowledged. But there are some special formalities prescribed which must be observed by the owner of copyright in lectures, in order that his rights may be effectively enforced in certain cases. These have been laid down in sub-sec. (v) of sec. 2, sch. I. This provides that the publication in a newspaper of a report of a lecture delivered in public shall not constitute an infringement unless the report is prohibited¹ and the prohibition must be (a) by conspicuous written or printed notice, (b) affixed before and maintained during the lecture, (c) at or about the main entrance of the building in which the lecture is given, and (d) in a position near the lecturer except whilst the building is being used for public worship. There is one solitary exception made in favour of political speeches (see sec. 20, sch. I) delivered at public meetings, a publication of which in a newspaper shall not constitute an infringement.

'Delivery' of
Lecture.

'Delivery' of a lecture, before the present Act, was defined to mean communication to the public by oral delivery.² Under the present law, however, the meaning is very much extended in keeping with the needs of the times. In these days of mechanical instruments such as talking machines, and the like it would give poor protection, indeed, if infringements were held to be possible by oral delivery alone. Sec. 35 (1) of sch. I, therefore, provides that 'delivery' in relation to a lecture includes delivery by means of any mechanical instrument. This is of a piece with similar other provisions noted above, and particularly sec. 19 of the Act which recognises the part played by records, perforated rolls and other contrivances for mechanical productions of sound in the modern world.

Copyright in
Translations.

The subject of translations requires special consideration. A translation means an accurate interpretation of the whole work so as to make it known through the medium of the new language.³ Under the present law copyright includes the exclusive right of translation of the work. Thus copyright and translating right are now co-extensive. This was not so under

¹ This does not apply to newspaper summaries.

² *Caird v. Sime* (1887) 12 A.C. 326.

³ *Wood v. Chart* (1870) L.R. 10 Eq. 193.

the old law.¹ The author now has the sole translating right and unauthorised translations are infringements of his copyright. In this connection it is essential to note the variation introduced by the Indian enactment (Act III of 1914). Sec. 4 (1) provides as follows:—

“In the case of works first published in British India, copyright shall be subject to the limitation that the sole right to produce, reproduce, perform or publish a translation of the work shall subsist only for a period of ten years from the date of the first publication of the work; provided that if within the said period the author, or any person to whom he has granted permission so to do, publishes a translation of any such work in any language, copyright in such work as regards the sole right to produce, reproduce perform or publish a translation in that language shall not be subject to the limitation prescribed in this sub-section.”

It is, therefore, necessary for the author, or any one who obtains a permit for translation from him, to produce, reproduce, perform, or publish the translation within ten years from the date of first publication, so that he may then enjoy the copyright for the usual period prescribed by the Act, viz. the life of the author and fifty years thereafter.

Now to pass on to other forms of copyright. It will be observed that, under the present Act, copyright extends to original, literary, dramatic, musical and artistic work. The features of copyright which we have been discussing so far apply to all the forms of copyright abovementioned. But there are some special characteristics which pertain to dramatic, musical and artistic work, and it is necessary to deal with them somewhat in detail. Under sec. 35 (1) of sch. I of the Act, “Dramatic work” includes any piece for recitation, choreographic work² or entertainment in

Copyright in
‘Dramatic work’
—special features.

¹ See, for instance, *Munshi Sh. Abdur Rahman and another v. Mirza Md. Shirazi* I.L.R. 14 B. 586, and *Macmillan and others v. K.B. Shamsul-ulama M. Zaka*, I.L.R. 19 B. 557.

² I am indebted to Mr. Oldfield for the following explanation of choreographic work which is quoted in his book on the law of copyright (p. 30, Note u). “A choreographic work represents a processional dance, sometimes also a dancing group, which has for its object the reproduction on the stage of a determinate subject, often an allegory or a symbolic grouping, see ‘Le Droit d’Auteur’ (1899), p. 14. The author of the choreographic work is the ballet master or person who has arranged the steps of the dance or the scenic or acting form, and has the copyright,

‘Choreographic’
work.

dumbshow, the scenic arrangement or acting form or which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form, or the combination of incidents represented give the work an original character. These appear to be new forms of copyright created by the Act. At any rate, they are for the first time expressly provided for in the present Act. The Act of 1842 defined "dramatic piece" as "every tragedy, comedy, play, opera, farce, or *other scenic or dramatic entertainment*." Although, however, the old statute did not expressly provide for all the different forms of entertainment included in the definition of dramatic work under sec. 35 of sch. I, some of them at any rate were held to come within its scope. Thus in *Karno v. Pathe Freres*¹ the Court observed: "Looking to the object of the statute which is evidently to protect the results of independent labour and composition in dramatic work and to extend to dramatic compositions the same protection as that already given to books, I see no reason in the nature of things why a dramatic composition which is entirely pantomimic or performed in dumbshow, and neither reduced nor reducible into writing, should not be protected against piracy as being a piece 'composed,' i.e. 'put together' by its author."

The intention of the Act, however, it must be remembered, is to protect original works, and original works only. In *Chatterton v. Cave* the whole of the language of the defendant's drama was different from the plaintiff's; only in the last scene an expedient was adopted which was identical with that adopted by the plaintiff's drama. It was held that in as much as the two versions were substantially independent there was no infringement of copyright. "I think," observed the Court, "this would be going too far. The intention is to protect original work; it would be descending to absurdity to give protection to the application of a common-place expedient of scenic art

just as the composer of the music or the writer of the libretto are each of them the authors of their respective works, see *Stichel v Mendi et Hahn* (1911) Trib. Civil de la Seine 30 Ch. 10 Feb and "*Le Droit d' Auteur*" 1911 p 38; reported also in the Daily Telegraph Feb. 10, 1911.—Oldfield's 'Law of Copyright.'

¹ (1908) 99. L.T. 114, at p. 117; 100 L.T. 260.

to the end of a version of drama.”¹ Nor is there any infringement of copyright where the similarity between the two dramatic pieces is due to mere coincidence.²

The word “cinematograph” is under sec. 35, sub-sec (1), sch. I, made sufficiently elastic to cover “any work produced by any process analogous to cinematography.” It will also be observed that the process of extending copyright has been carried still further, for sec. 1, sub-sec. 2 (d), sch. I, provides that copyright in the case of literary, dramatic or musical work “shall include the sole right to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered, and to authorise any such acts as aforesaid.”³

Cinematograph.

The general principles abovementioned as to infringement of copyright apply to musical works.⁴ Consequently, the old cases on the subject continue to be of considerable help. Take the following dictum, for instance, laid down in *D'Almaine v. Boosey*⁵ which remains as true to-day as it was when it was uttered. “The mere adaptation of the air, either by changing it to a dance or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The air tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is where the appropriated music, though adapted to a different purpose from that of the original, may still be recognised by the ear. The adding variations makes no difference in the principle.” Again take the following passage from the same case “Piracy may be of part of an air as well as of the whole If the plaintiffs were entitled to the whole,

Copyright in musical work.

¹ *Chatterton v. Cave* (1875) L.R. 10. C.P. 572 at p. 579.

² *Robt v. Palace Theatre* (1911) 28. T.L.R. 69.

³ See *Monckton v. Pathe Freres Pathephone Ltd.* L.R. (1914) 1 K.B. 395.

⁴ “Musical work” i. defined in sec. 5 of Act III of 1914. It is also ‘Musical work’ defined in the musical (Summary Proceedings) Copyright Act of 1902, which stands unrepealed, as follows: “Musical work is any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced.” The reader is invited to compare the two definitions.

⁵ (1835) 1 Y. & C. 288 at p. 302; s.c. 160 Eng. Rep. 117.

a fortiori they were entitled to publish the melodies which form a part. It is the air or melody which is the invention of the author and which may in such case be the subject of piracy; and you commit a piracy if, by taking not a single bar, but several, you incorporate in the new work that in which the whole meritorious part of the invention consists"¹ . . . Musical merit or excellence in the piece copied is no more necessary to constitute infringement than literary merit or excellence to infringement of literary copyright.

Musical copyright includes under sec. 1, sub-sec. 2 (d), sch. I, of the Act the sole right "to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered, and to authorise any such act as aforesaid." This, however, is subject to the exceptions indicated in sec. 19, sch. I, of the Act, the elaborate provisions of which section relate exclusively to records, perforated rolls and other mechanical instruments for the production of sound.

Into the details of the section we do not propose to enter. But the general scheme and intent of the law relating to manufacture of mechanical contrivances may be briefly indicated thus. The composer of a musical work has the copyright in it, and such copyright, as observed above, includes the sole right to make any record, perforated roll, cinematograph film or other contrivance by means of which the work may be mechanically performed or delivered. The term for which such copyright subsists is the life of the author and fifty years thereafter. If he chooses, however, to make a record, perforated roll or mechanical contrivance or consents or acquiesces in its making within such period, any one has the right to reproduce his musical work on payment of a royalty and on giving notice in the manner prescribed. Thus the owner of the copyright is precluded from granting to any particular person or firm an exclusive licence for mechanically reproducing his work. It is clear that the section is intended to protect manufacturers of mechanical contrivances in such a manner that no one, by being

¹ *Per* Lord Abinger, C.B. in *D'Almeida v. Boosey* (1835) 1 Y. & C. Ex. 288 at pp. 30-2; s.c. 160 Eng. Rep. 117.

first in the field in securing the permission of the owner of the copyright, may derive an advantage in preference to others. It is to be noted that the mechanical contrivance for the reproduction of any work is not included within the "musical work" as interpreted in this section (sub-section 2, proviso (ii)). Therefore in case of records, a manufacturer is not entitled to reproduce *directly from another record*, even upon payment of royalty; all that he can do is to make an entirely fresh record for himself subject, of course, to the payment of royalty, etc. The same proviso also lays down that the musical work would include "words so closely, associated therewith as to form part of the same work." The power of such reproduction is limited. The reproducer must reproduce the work as it has been consented to or acquiesced in by the owner of the copyright and is not authorised to make any alteration in, or omissions from, the same, unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question. The section then goes on to lay down the rate at which the royalty is to be paid and the mode of apportionment of such royalty when there are more owners than one in the works reproduced by the contrivance. It also provides for the enquiry that has to be made and the mode of giving the notice and the particulars to be contained therein.

Clauses 7 and 8 of the section provide for the case of musical works published already, before the commencement of the Act.

Clause (7) of section 19, schedule I of the Act deals in detail with the position of musical works published before the commencement of the Act. Besides provisions relating to rates of royalty¹ the details whereof we need not discuss, it lays down certain other provisions which are of some importance. Firstly, the conditions in sections 19 (2) (a) and 19 (2) (b) (i) are made inapplicable to such works. Secondly, in the case of assignments of copyright in musical works made prior to the passing of the Act it is provided that any rights conferred by the Act in respect of the

¹ See *Monckton v. Pathe Freres Ltd.* I.R. (1914) 1 K.B. 395.

making or authorising the making of contrivances by means of which such works may be mechanically performed shall belong to the author thereof or his legal personal representatives and not to the assignees, and the royalties shall be payable to the former and not to the latter. Thirdly, if any person has made such mechanical contrivances whether before or after the passing of this Act it is provided that he shall not sell any such contrivances except on the terms and subject to the conditions laid down in the previous portion of the section. Fourthly, where copyright is conferred by an Order in Council on a work of a foreign country the copyright so conferred shall not, except to such extent as may be provided by the Order, include any rights with respect to the making of records, perforated rolls or other contrivances by means of which the work may be mechanically performed. Section 19, sub-section (8), schedule I, lays down explicitly that where a record, perforated roll or other contrivance by means of which sound may be mechanically reproduced has been made before the commencement of the Act, copyright shall as from the commencement of the Act, subsist therein in like manner and for the like term as if this Act had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived, that is, fifty years from the making of the original plate.

Artistic Copyright

‘Artistic work’ under the Act appears to have a fairly wide denotation. Section 35 (1) provides that artistic works shall include “works of painting, drawing, sculpture and artistic craftsmanship and architectural work of art and engravings and photographs.” The expression ‘works of sculpture’ includes casts and models. ‘Architectural work of art’ is defined as “any building or structure having an artistic character or design, in respect of such character or design, or any model for such building or structure, provided that the protection afforded by this Act be confined to the artistic character and design, and shall not extend to processes or methods of construction.”

It will be remembered that copyright under the Act means the sole right to *produce* or *reproduce* the work, or any substantial part thereof, in any material

form whatsoever, *to perform*¹ the work or any substantial part thereof in public, and if the work is unpublished, *to publish* the work or any substantial part thereof. Now it would be worth while to consider carefully the contents of this definition. A liberal construction of the words 'to produce or reproduce,' would appear to lead to the position that a painting, drawing, engraving or photograph of a work of sculpture or artistic craftsmanship would constitute reproduction; but such a construction is precluded by sec. 2 sub-sec. (1) (iii), sch. I of the Act which provides that the making or publishing of paintings, drawings, engravings, or photographs, of a work of sculpture or artistic craftsmanship, if permanently situate in a public place or building, or the making or publishing of paintings, drawings, engravings or photographs (which are not in the nature of architectural drawings or plans) of any architectural work of art shall not constitute an infringement of copyright. But consider the case of an artistic work which is converted into a dramatic work, as for instance in the form of *tableaux vivants*. Under the old law it would not constitute an infringement. But it would appear clearly to come within the meaning of sec. 1, sub-sec. (2), sch. I of the present Act. In a group of cases known as the 'Living Picture' cases² the question of *tableaux vivants* Living Pictures was fully considered. In *Hanfstaengl v. Empire Palace* the defendants had produced on their stage certain *tableaux vivants*, which were intended to be representations of pictures the copyright in which belonged to the plaintiff. Lord Justice Lindley in giving judgment said, "We are asked to say that the words 'copying and reproducing by any means' include reproducing in the sense of imitating or representing by means not equivalent to drawing or painting or photographing or any such means, but by totally different means, by the exhibition of living figures. Is that what is aimed at? It appears to me that obviously and plainly it is not It is intended to protect the author of the picture

¹ *Fenning Film Service Ltd v Wolverhampton, Walsall and District Cinemas Ltd* (1914) L.R. 3 K.B. 1171.

² *Hanfstaengl v. Empire Palace* (1894) 2 Ch. 1; *Hanfstaengl v. Newnes*, (1894) 3 Ch. 109, *Hanfstaengl v. Baines* (1895) A.C. 20.

from any body's producing a painting, drawing or photograph of his picture so as to compete with him in the market: . . . I think a good deal of light is thrown upon the question by the case of *Dicks v. Brooks*¹ because although it is very true, as was pressed upon us by Mr. Scrutton, that the word 'design' is not used in the Engraving Acts, still the object of the Acts in protecting engravings is exactly the same as the object which the legislature had in view in protecting paintings, drawings, and photographs in this Act. It was not meant to give them the right to restrain Madame Tussaud from exhibiting a representation of a painting in wax work; but to restrain people from producing something which would compete in the market with the originals or with authorised copies of them."² So also Lord Justice Kay:—"What does 'reproduction' really mean? Reproduction is producing again. Is this a producing again the design of this painting within the meaning of the copyright Act? I cannot think that it is. It seems to me that in order to produce the painting you must have something which itself is and would be properly described as a picture."³ It seems that in view of the express provisions of sec. I, sub-sec. (2) of the present Act the law must be taken to have been modified, for copyright now means "the sole right to produce or reproduce the work or any substantial part thereof in *any material form whatsoever*. That being so, it seems to follow that a representation of a painting in wax work can constitute an infringement under the present law.

We proceed now to consider some other important provisions of the Act which have made profound modifications in the law of copyright. The first of these is with regard to the term of copyright or the period during which the copyright monopoly is to last. It is recognised that it is against public policy and all principles of fairness and equity that the monopoly should be perpetual. There must be a point of time when the monopoly should cease and the property in the work should be capable of being enjoyed by the public without any restriction. The problem,

Term of
copyright.

¹ (1880) 15 Ch. D. 22.

³ *Ibid.* at p. 8.

² (1894) 3 Ch. 1 at pp. 5, 6.

therefore, is to lay down what the point of time should be. It is also the duty of the legislature to fix the point of time at which the monopoly begins, that is to say whether it should spring up immediately upon the production of the work, or upon its publication, and so on. Thus the subject as to the term of copyright is closely associated with the further questions as to what is meant by the 'making' of the work and what is meant by 'publishing' it. We shall now briefly consider these allied matters.

It will be remembered that formerly the author had a common law right in his unpublished work from the date of the making of the work until the date of its publication—what I have called for convenience 'copyright-before-publication.' As soon as the work was published, the copyright with regard to it came to be governed by statute. Thus there was, before the present Act, the broad difference between copyright-before-publication governed by the common law and copyright-after-publication governed by statute. In practice, however, there was less simplicity and more lack of uniformity than would appear from the enunciation of the law given above. For instance, in *Tuck v. Priester*¹ it was held that copyright in paintings, drawings and photographs commenced from the date the works were *made*; in other words, the common law right and the statutory right would be synchronous. The present Act renders the common law right quite unnecessary and brings copyright-before-publication and copyright-after-publication on the same statutory footing as will appear from sec. 1, sub-sec. (1). It provides that in the case of all unpublished works, whether literary, dramatic, musical or artistic, copyright is to subsist from "the date of the making of the work," provided that the author was at that date a British subject, or resident within His Majesty's Dominions.² In the case of a published work, the question of publication is important in as much as the section provides as a necessary condition that the work should be first published within His Majesty's dominions. Other distinctions

The distinction between common law right and statutory right.

¹ (1887) 19 Q.B.D. p. 629, *per* Lord Esher M.R. at p. 636.

² Note, however, the concluding words of sec. 1, sub-sec. (1).

between published and unpublished works is removed by the new Act. Lest there should be any doubt as to the abolition of the common law right regarding unpublished works, sec. 31 makes a clear pronouncement by providing as follows:—"No person shall be entitled to copyright or any similar right in any literary, dramatic, musical or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence." The last portion of the section evidently refers to the principle so often indicated in cases like *Prince Albert v. Strange* (see Lect. VI) that an injunction restraining publication might be granted upon the ground of breach of confidence, and continues the same relief under the present law.

Publication.

The question as to what constitutes 'publication' of a work, as also the date of such publication, is thus not of such consequence under the present law as it was formerly. Under the old law, the term of copyright often expired at a fixed date reckoned from the date of first publication. Under the new law, copyright in regard to published works expires fifty years after the author's death. Thus the precise date of publication is immaterial. The term of copyright according to sec. 3, sch. I of the present Act shall be, "except as otherwise expressly provided by this Act," the life of the author and a period of fifty years after his death.¹ It should be noted that in some cases there may be occasion under the present Act to ascertain whether and when a work has been published, because it may so happen that a work, if published, would be entitled to protection but, if unpublished, may be entitled to no protection at all. Thus sec. 1, sch. I provides that copyright is to subsist in published literary, dramatic and artistic works if they are first published within the parts of His Majesty's dominions to which the Act extends, but in the case of unpublished works, only "if the author

¹ Note, however, the proviso in sec. 3.

was at the *date of the making of the work* a British subject or resident within such parts of His Majesty's dominions as aforesaid." From this it appears that a foreigner may be entitled to no copyright in his unpublished work, although he might by first publication on Indian soil acquire an Indian copyright in the same work. The anomalies and inconveniences resulting from this are somewhat met by the provisions of sec. 29 (1), sch. I.

'Publication' is defined¹ as "the issue of copies of the works to the public," but it is provided that it "does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work or the construction of an architectural work of art, but for the purposes of this provision, the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works."

With regard to the period during which the copy-^{Special cases.}right is to subsist, the Act provides for certain special cases which are not covered by sec. 3, schedule I of the Act. Thus the case of a work of joint authorship is naturally attended with some difficulty.² Sec. 16, sch. I, therefore provides that the period in such a case is to be the life of the author who dies first and fifty years thereafter, or the life of the author who dies last, whichever period is the longer. In the case of posthumous works, whether it be literary dramatic or musical work or an engraving, sec. 17, sch. I provides that the copyright subsists till publication, and for a period of fifty years thereafter. Thus in such cases the date of publication is material and the effect of the law is as if the author died at the date of the publication. Government publications have been specially provided for by sec. 18, sched. I, the period of copyright laid down being fifty years from the date of publication. In the case of mechanical instruments for the production of sound the term of copyright is fifty years from the

¹ Sec I, sub-sec. (3) of the Act.

² On the question as to the right of a part owner of the copyright in a book to sue the other part owner for infringement, see *Cescinsky v. George Routledge & Sons, Ltd.* L.R. (1916 2 K.B. 325).

making of the original plate from which the contrivance was directly or indirectly derived. (Sec. 19, sub-sec. (1), sch. I. In the case of photographs the term is fifty years from the making of the original negative from which the photograph was directly or indirectly derived (sec. 21, sch. I).

Assignment of
Copyright.

The subject of assignment of copyright is dealt with in section 5, sub-sections (2) and (3), schedule I. The owner of the copyright in any work may assign the right either wholly or partially, either generally or subject to limitations to the United Kingdom, or any self-governing dominion or other part of His Majesty's dominions to which the Act extends, and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by licence. It seems that the limitations to any smaller area than those indicated in the section, such as a County in the United Kingdom or a Province of any of His Majesty's dominions, are not allowable. The assignment or grant by licence in order to be valid must be in writing signed by the owner of the copyright or by his duly authorised agent. There is a special restriction imposed by the proviso to sub-section (2) in regard to assignment by the author of a work who is the first owner of the copyright therein. It lays down that no assignment of the copyright and no grant of any interest therein made by him (otherwise than by will) after the passing of the Act, shall be operative to vest in the assignee or grantee any rights beyond the expiration of twenty-five years from the death of the author; and it is further provided that the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to disposition of such reversionary interest shall be null and void. There are two exceptions, viz. assignment of the copyright in a collective work and a licence to publish a work or part of a work as part of, a collective work. It would appear, therefore, that the person who has the copyright in a collective work as such may assign such copyright for the full term. If the

owner of the copyright in the collective work happens also to be the author of any part of that work, he can assign the copyright in that part for the limited term only. Similarly, a contributor to such collective work can assign the copyright in his contribution for the limited term only, but he can grant a licence to publish his contributions as part of the collective work for the full term. The provision in sub-section (2) authorising partial assignment of copyright renders it necessary in sub-section (3) to remove all conflict of interest by providing that in case of such partial assignment, the assignee, as respects the rights so assigned and the assignor, as respects the rights not assigned, shall be treated as the owner of the copyright. It is to be noted that section 19, sub-sections (7) and (8), section 24, and section 33 of schedule I taken together contain all the provisions in the present Act for saving of pre-existing rights. Section 19, sub-sections (7) and (8) as observed above relate to musical works published before the commencement of the Act. Section 33 relates to the Universities and Colleges mentioned in the Copyright Act, 1775,¹ and lays down that they shall not by the present Act be deprived of any copyright they already possess, but the remedies and penalties for infringement of any such copyright shall be under the present Act and not under that Act. The elaborate provisions of sec. 24 concern themselves with the saving of rights in existing works generally, but subject to terms to be settled by agreement or arbitration. Section 24, sub-section (3) lays down that, subject to the provisions of section 19, sub-sections (7) and (8) and of section 33, copyright shall not subsist in any work made before the commencement of the Act otherwise than under and in accordance with the provisions of section 24.

The remedies in India afforded by the Act for infringement of copyright are of two classes, civil and criminal. First, as to civil remedies. Every suit or other civil proceeding regarding infringement of copyright has to be instituted and tried in the High Court or the Court of the District Judge.² The

The remedies under the Copyright Act in India.

¹ 15 Geo III C. 53

² See Section 13, Act III of 1914.

remedies are provided for in sec. 6 (1), sch. I, which runs as follows:—‘ When copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction or interdict, damages, account and otherwise, as are or may be conferred by law for the infringement of a right.’ Only the “owner” of the copyright is entitled to the remedies, consequently a mere agent¹ or a licensee² cannot bring the action, and the period of limitation for bringing the action is three years from the infringement.³

Injunction—the usual remedy.

The most usual remedy is an injunction (or an interdict) except in the case of architecture contemplated in s. 9 (1), sch. I. The injunction may be either interlocutory or final. It is interlocutory when it is granted prior to the trial only until that trial, or further orders. It is final when it is granted at the trial of the action. The law as to interlocutory injunctions in India is laid down in Order 39 of the Civil Procedure Code. It appears that delay in the institution of proceedings would necessarily be no ground for refusing an injunction. But where such delay amounts to a tacit permission to reproduce the work, an injunction will be refused.⁴

On proof of an infringement, an injunction will be granted, though actual damage is not proved; but mere suggestion of possible injury will not constitute a sufficient ground for injunction. There must be reasonable probability that, in fact, there will be damage to the party complaining⁵ as also the likelihood of continuance of the infringement.⁶ “An

¹ *Nicol v. Stockdale* 3 Swans 687 s.c. 36 Eng. Rep. 1023; *Petty v. Taylor* (1897) 1 Ch. 465.

² *Neilson v. Horniman* (1909) 25 T.L.R. 684.

³ S. 10, sch. I of the Act.

⁴ *Rundell v. Murray* (1821) Jac. 311 s.c. 37 Eng. Rep. 868. “There has often been great difficulty about granting injunctions, where the plaintiff has previously, by acquiescence, permitted many others to publish the work; where ten have been allowed to publish the Court will not restrain the eleventh. A Court of Equity frequently refuses an injunction where it acknowledges a right, when the conduct of the party complaining has led to the state of things that occasions the application.” *Per* Lord Eldon. *Ibid.*, at p. 316. See also *Saunders v. Smith* (1838) 3 My. and Cr. 711 s.c. 4 Eng. Rep. 1100; and *Hogg v. Scott* (1874) 18 Eq. 444.

⁵ *Borthwick v. Evening Post* (1888) 37 Ch. D. 449.

⁶ In this connection see *Cox v. Land and Water Journal Co.* (1869) 9 Eq. 324.

injunction can only be granted in respect of matters with regard to which the plaintiffs now have the copyright and a present right to sue; they cannot have any protection by injunction to restrain the defendants for publishing hereafter any future entries with respect to which the plaintiffs may possibly, before they are published, acquire a copyright.¹

An interesting question arises sometimes as to the extent to which an injunction should go in a case where portion only of the work complained against is piratical. In such a case if the part which has been copied from the plaintiff's work can be separated from that which has not been copied, an injunction will issue against the objectionable part or parts only. But where the parts which have been copied cannot be separated from those which are original without destroying the use and value of the original matter an injunction must be issued against the whole, "for he who has made an improper use of that which did not belong to him must suffer the consequences of so doing." Lord Eldon observed in the case of *Mawman v. Tegg*² "As to the hard consequences which would follow from granting an injunction, when a very large proportion of the work is unquestionably original, I can only say that if the parts which have been copied cannot be separated from those which are original, without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to me and the mixture be forbidden by law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses in any work to mix my literary matter with his own, he must be refrained from publishing the literary matter, which belongs to me, and if the parts of the work cannot be separated and if by that means the injunction which restrained the publication of my literary matter prevents also the publication of his own literary matter, he has only

Special cases of
injunction.

¹ *Cate v. Devon and Exeter Constitutional Newspaper Co.* 40 Ch. D. 500 (507).

² (1826) 2 Russ. 385 at pp 390, 391, s c. 38 Eng. Rep. 380.

himself to blame." In any event, where a book is published consisting of matter pirated from the plaintiffs works intermixed with original matter, the Court without waiting till all the parts which have been pirated can be distinctly ascertained will enjoin the defendant from publishing his book containing any articles pirated from the plaintiff's work.¹

Similarity of appearance has often led the Court to grant an injunction; but the similarity must be misleading, i.e. such as an intending purchaser of the one might be misled into purchasing the other.² The question is: Did the defendant dishonestly pass off his work as the work of the plaintiffs? The defendants are not entitled to publish a work with such a title, or in such a form as to binding or general appearance as to be a colourable imitation of the plaintiff.³ But if the similarity be not deceptive,—i.e. if a paper be started with the title "Punch and Judy," in the face of two existing papers one called "Punch" and one called "Judy,"—an injunction would not be granted.⁴

Restriction in cases
of architecture.

It should be noted that sec. 9 of the Act lays down a special restriction on remedies in cases of architecture. "Where the construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work has been commenced, the owner of the copyright shall not be entitled to obtain an injunction or interdict to restrain the construction of such building or structure or to order its demolition." The alternative remedy by way of damages is no doubt open to him.

Damages.

The next remedy is by way of damages. The measure of damages will be, as in the case of infringement of any other right, the loss suffered by the owner of the copyright on account of the diminution of the sale of his work, of the loss of profit which he might otherwise have made. But only

¹ *Lewis v. Fullarton* (1839) 2 Beav. 6 at p. 14 s.c. 48 Eng. Rep. 1080 followed in *Kelly v. Morris* (1866) L.R. 1 Eq. 697 at p. 701.

² See the *Camel Hair Belling Case* (which was the case of a Trade name) *Frank Reddaway v. George Banham* (1895) A.C. 199, approved in *Parsons v. Gillespie* (1898) A.C. 239.

³ *Mack v. Petter* (1872) L.R. 14 Eq. 431; *Metzler v. Wood* (1878) 8 Ch. D. 609.

⁴ *Bradbury v. Beeton* (1869) 18 W.R. 33; *Borthwick v. Evening Post* (1888) 37 Ch. D. 449

nominal damages¹ would be awarded, if the defendant has suppressed the infringement and has removed all cause of complaint. There is another way in which the Act allows him compensation. The plaintiff may base his claim for damages on section 7, schedule I of the Act which provides that "all infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of possession thereof or in respect of the conversion thereof." It appears that under this section the plaintiff would get by way of compensation the price of every copy of the work sold. As observed by James L.J. in *Pike v. Nicholas*,² the defendant is to account for every copy of the book sold as if it had been a copy of the plaintiffs, and to pay the plaintiff the profit which he would have received from the sale of so many additional copies. It will be observed that section 7 besides providing for damages as in an action for conversion of the books which the defendant has actually sold, affords a further remedy to the plaintiff in the shape of delivery up of all books in the defendant's possession as in an action of detinue.³ It has sometimes been contended that the plaintiff who claims to sue under this section must elect to sue either in detinue or in trover and cannot sue in both; but it has been held that he can pursue both the remedies simultaneously.⁴ If the piracy is only of a part of the work, the plaintiff, nevertheless, can recover possession of the whole, unless the pirated parts can be separated from the non-pirated parts,⁵ or unless the infringement is not of a 'substantial part' of the work.⁶

¹ *Hanfstaengl v. W. H. Smith & Sons* (1905) 1 Ch. 519.

² 5 Ch. Ap. 251. See also *Delfe v. Delamotte* (1857) 3 K. & J. 581; s.c. 112 R. R. 292; s.c. 69 Eng. Rep. 1241.

³ *Muddock v. Blackwood* (1898) 1 Ch. 58.

⁴ *Ibid.*

⁵ *Mawman v. Tegg* (1826) 2 Russ. 385 at p. 391 s.c. 38 Eng. Rep. 380.; *Warne & Co. v. Seeborhm* (1888) 39 Ch. D. 73 at p. 83; *Boosey & Co v. Whight & Co.* (No. 2) (1899), 31 L.T. 265 See also *Stevens v. Wildy* (1850) 19 L.J. Ch. 190.

⁶ S. 7, sch. I of the Act.

Account of profits

Another remedy is an account of profits,—an equitable remedy which is incidental to the right of injunction.¹ But a plaintiff cannot have both an account of profits and an enquiry into damages; he must elect one of them.² The oft-quoted observation of Wigram V.C. in *Colburn v. Simms*³ illustrates lucidly the principle on which an account is granted. "It is true," says he, "that the Court does not by any account, accurately measure the damage sustained by the proprietor of an expensive work from the invasion of his copyright by the publication of a cheaper book. It is impossible to know how many copies of the dearer book are excluded from sale by the interposition of the cheaper one. The court, by the account, as the nearest approximation which it can make to justice, takes from the wrong doer all the profits he has made by his piracy, and gives them to the party who has been wronged. In doing this the Court may often give the injured party more, in fact, than he is entitled to, for *non constat* that a single additional copy of the more expensive book would have been sold, if the injury by the sale of the cheaper book had not been committed. The Court of Equity, however, does not give anything beyond the account." But it appears that where there are no profits, or where there is no adequate means of ascertaining the profits the Court will give damages and not order an account.⁴

Statutory presumptions.

In an action for infringement of copyright, the law has laid down certain presumptions which will be found in sub-section (3) of section 6 of schedule I of the Act. First, the work shall be presumed to be a work in which copyright subsists (unless the defendant puts in issue the existence of the copyright), and, secondly, the plaintiff shall be presumed to be the owner of the copyright, unless, of course the defendant puts in issue the title of the plaintiff.

¹ *Basly v. Taylor* (1829) 1 Russ. and My. 73; s.c. 39 Eng. Rep. 28; *Kelly v. Hooper* (1840) 1 Y. and C.C.C. 197; s.c. 62 Eng. Rep. 852.

² *De Vitre v. Betts* (1873) L.R. 6 H.L.C. 319 (which was a case of infringement of a patent).

³ (1843) 2 Ha. 543 at p. 560; s.c. 67 Eng. Rep. 224. See also *Pike v. Nicholas* (1870) 5 Ch. A. 251 at p. 255.

⁴ *Powell v. Aikin* (1857) 4 K. and J. 343 at p. 351; s.c. 70 Eng. Rep. 144; *Mawman v. Tegg* (1826) 2 Russ. 385 at p. 400, s.c. 38 Eng. Rep. 380.

Where any such question arises for determination, then the person whose name appears on the work purporting to be that of the author, shall be presumed to be the author, unless the contrary is proved; or, if no name appears, or if the name appearing is only a pseudonym, then the person whose name appears to be the publisher or proprietor of the work, shall be presumed to be the owner of the copyright, unless the contrary is shown.

The costs of all parties in any proceedings in respect of the infringement of copyright shall be in the absolute discretion of the Court. Costs.

There cannot be one action against several persons infringing the copyright, the right of an author against different book-sellers selling the same spurious edition of his work not being joint, but a distinct right against each.¹ Action against several infringers.

The summary remedies (which apply to all cases except cases of architecture mentioned in section 9, schedule I of the Act) for infringement of copyright are laid down in sections 7 to 12 of the Act. A fine of twenty rupees for every infringing copy (subject to a maximum of five hundred rupees in respect of infringements comprised in the same transaction), shall be levied upon a person who, knowingly, makes or imports into British India for sale or hire, or sells or lets for hire, or by way of trade exposes or offers for sale or hire, or distributes, either for the purposes of trade or to an extent affecting prejudicially the owner of the copyright, or exhibits in public by way of trade, any infringing copy of a work in which copyright subsists. A fine up to a sum of five hundred rupees is also prescribed for a person who knowingly makes or has in his possession any plate for making infringing copies, or knowingly and for his private profit causes any work (in which copyright subsists) to be performed in public, without the consent of the owner of the copyright. Whether an alleged offender is convicted or not the Court (which must not be inferior to that of a Presidency Magistrate or a Magistrate of the first class) before which the offence is tried, may order that all copies of the Summary remedies

¹ *Dilly v. Doig* (1790) 2 Ves. 486; s c. Eng. Rep. 738.

work or all plates in the possession of the alleged offender, which appear to it to be infringing copies, or plates for the purpose of making infringing copies, be destroyed or delivered up to the owner of the copyright or otherwise dealt with as the Court may think fit.¹ A subsequent offence is punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

Special remedy
against importa-
tion.

There is a special remedy provided for in section 6 of the Act which prohibits importation of "copies made out of British India of any work in which copyright subsists which if made in British India would infringe copyright, and as to which the owner of the copyright gives notice in writing by himself or by his agent to the Chief Customs Officer, that he is desirous that such copies should not be imported into British India." On the owner of the copyright giving such notice, the copies will be deemed to be prohibited imports within the meaning of section 18 of the Sea Customs Act (VIII of 1878). For further details as to the procedure laid down in the section, the reader is referred to sub-clauses (2) to (5) of the section.

Exceptions to lia-
bility—innocent
infringer

We shall now consider the exceptions to liability for infringement of copyright. The most important exception is that laid down in sec. 8 of the Act, exempting the innocent infringer from liability to pay damages. The meaning of the section, however, is far from clear. What is the test of innocence? Let us consider for a moment the wording of the section. "Where proceedings are taken in respect of the infringement of the copyright in any work, and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement if the defendant proves that at the date of the infringement he was not aware, and had no reasonable ground for suspecting that copyright sub-

¹ An appeal is allowed against such an order for destruction or delivery up of copies within thirty days of the date of such order and it lies to the Court to which appeals from the Court making the order ordinarily lie. The appellate court is given the power to stay execution of the order pending the appeal.

sisted in the work." Thus it appears that innocence under the law is equivalent to ignorance that copyright subsisted in the work. In the case of *Byrne v. Statist Co.*, decided in 1914,¹ this question came up for consideration. The facts were as follows:—B. was employed by the proprietors of a newspaper to translate and summarise a speech of the Governor of Bahia State (Brazil) for publication as an advertisement in their paper. The advertisement appeared in the paper with the words at the end "Translated from the Portuguese language by F. D. Byrne." The defendants subsequently obtained permission from the Governor to publish it as an advertisement in their paper for which they were duly paid, and they reproduced the whole of it *verbatim*. It was held in a suit for infringement of copyright that sec 8 did not exempt the defendants from liability. Bailhache J. observed: "The position of the defendants was not so much that they did not suspect copyright, as that they supposed the copyright was in the Governor of Bahia whose instructions for its reproduction they had obtained. This merely amounts to saying that they supposed themselves to have the authority of the owner of the copyright, a very different thing from alleging and proving that they did not suspect that any copyright existed. It is this latter state of mind that sec. 8 requires to be proved and sec. 8 is no protection to a person who, knowing or suspecting that copyright exists, makes a mistake as to the owner of the copyright and under that mistake obtains authority to publish from a person who is not in fact the owner."² As Mr. Copinger says in his well-known book on the law of copyright, the only grounds for not suspecting copyright appear to be either (a) that the period of copyright protection has run out or (b) that he thinks that the work is of such a character that it ought not to be a subject of copyright. Thus after all sec. 8 does not really give much of an exemption if this is what innocent infringement means.

The other recognised exceptions to liability are Libellous, immoral, independent of the Act and we have to turn to case obscene or irreligious works.

¹ 1914 1 K.B. 622.

² *Ibid.* at p. 628.

law for them. From years past there have been many cases which lay down the doctrine that copyright cannot exist in works of libellous, immoral,¹ obscene or irreligious tendency. For the author in order to establish his copyright must first of all establish his right to sell the work, and if the work be objectionable on any of the grounds above mentioned he cannot acquire property therein, and therefore he cannot sell it. Copyright, therefore, would be out of the question. In the case of *Stockdale v. Onwehyn*² an action had been brought for the purpose of recovering compensation in damages for piracy of a publication entitled "The Memoirs of Harriette Wilson." The work was libellous and licentious. Abbott, C.J., said, "It would be a disgrace to the common law could a doubt be entertained on the subject" (viz., that the right does not subsist in a book of which the publication is itself an offence against the law.)³ In *Murray v. Benbow*⁴ an application for an injunction to restrain the defendants from publishing a pirated edition of Lord Byron's poem "Cain" was refused on the same principle. In another case an injunction which had been granted restraining an infringement of the same poet's work "Don Juan" was dissolved by Vice-Chancellor Leach on similar grounds. In *Lawrence v. Smith*⁵ Lord Eldon in dissolving the injunction remarked, "Looking at the general tenor of the work and at many particular parts of it, recollecting that the immortality of the soul is one of the doctrines of the scripture, considering that the law does not give protection to those who contradict scripture, and entertaining a doubt, I think a rational doubt, whether the book does not violate the law, I cannot continue the injunction." The decisions go further than this and lay down that there can be no copyright even in works

Works intended to
deceive the public.

¹ *Glyn v. Weston Feature Film Co.* L.R. (1916) I Ch. 261.

² (1826) 5 B. & C. 173, s.c. 108 Eng. Rep. 65.

³ It is interesting to note that the printer of the book above referred to brought an action for his bill against the publisher. It was held that he could not maintain such an action. Best, C.J., observed that the printer and the publisher were *participes criminis* and that he would not, as Lord Kenyon once said, sit to take an account between two robbers on Hounslow Heath.

⁴ (1822) Jac. 474 n; s.c. 37 Eng. Rep. 929.

⁵ (1822) Jac. 471 at p. 473, s.c. 37 Eng. Rep. 928.

which were intended to deceive the public, so that an action for pirating a work falsely professing to be a translation from the German of an author well-known for writings of a devotional character, in other words, a work apparently planned for defrauding purchasers, could not succeed.¹

A few words are needed to indicate the position of foreign authors, or that of works published in a foreign country, or produced by authors who at the time of production are either subjects or citizens of a foreign country or are resident in a foreign country. Section 29, schedule I, of the Act deals with the subject, and its provisions are so framed as to enable the Crown to ratify the decision of the Revised Berne Convention of 1908. Subject to certain provisos the section lays down that His Majesty may by Order in Council direct that the Act (i.e. Copyright Act, 1911, 1 & 2 Geo. V, C. 46, except such parts, if any, thereof as may be specified in the Order) shall apply (a) to works first published in a foreign country to which the Order relates, in like manner as if they were first published within the parts of His Majesty's dominions to which the Act extends; (b) to literary, dramatic, musical and artistic works, or any class thereof, the authors whereof were at the time of the making of the works subjects or citizens of a foreign country to which the Order relates, in like manner as if the authors were British subjects; (c) in respect of residence in a foreign country to which the order relates, in like manner as if such residence were residence in the parts of His Majesty's Dominions to which the Act extends; and thereupon the Act shall apply accordingly. Section 30 provides that such Orders in Council shall apply to all His Majesty's Dominions to which the Act extends except self-governing dominions, which may make the like orders on their own behalf.

DESIGNS.

A subject allied to copyright is that of "Designs," which has been dealt with by the Indian Legislature in the Indian Patents and Designs Act (II of 1911). By section 2, sub-section (5) of the said Act a "Design"

Definition.

¹ *Wright v. Tallis* (1845) 1 C.B. 893, s.c. 135 Eng. Rep. 794.

is defined as meaning "any design¹ applicable to any article, whether the design is applicable for pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical or chemical, separate or combined." A design must be distinguished from a trade mark,² i.e. mark used for denoting that goods are manufacture or merchandise of a particular person, nor does it include a property mark, i.e. a mark used for denoting that moveable property belongs to a particular person. Again, the distinction between a 'Design' and an 'Artistic work' (as defined in section 35, schedule I of the Indian Copyright Act, III of 1914) should not be lost sight of. An artistic work is valued and protected for its own artistic qualities, whereas a design must be applied to another article, and when it is so applied the article is purchased not only because of the artistic qualities of the design on it, but primarily because of the value and utility of the article itself.³

A design must be registered.

Unlike copyright under the Copyright Act (III of 1914), a design must be registered under the Indian Patents and Designs Act (II of 1911) for being protected from infringement. Under section 43 of the Act, a design can be registered by the Controller when an application is made to him in the prescribed form and accompanied by the prescribed fee. The requisite conditions are: (1) the application must be by a person claiming to be proprietor of the design; (2) the design must be new or original⁴; (3) the design must not have been previously published in India. The same

¹ See criticism by Lindley L.J., in *In re Clarke's Design* (1896), 2, Ch. 38 at p. 43: "Unfortunately the section says that a design means a design . . . the word 'design', therefore, must be taken to be used in its ordinary signification of something marked out—a plan or representation of something."

² See *Baker Truckers & Co. v. Sutherland McGuffie & Co.*, 16 W.R. 90, 8 B.L.R. 298.

³ *Millar and Lang Ltd. v. Polak* (1908) 1, Ch. 438; *Hanfstaengl v. Empire Palace* (1894) 2, Ch. 1, at p. 6.

⁴ There is novelty in applying an old thing to a new use—*Ernest Otto Gammeter v. The Controller of Patents and Designs and another* 22 C.W. N. 580; 48 I.C. 437. In *re Clark's Design* (1896)-2, Ch. 38. In *re Reade and Greswells' Design* (1889) 42, Ch.D. 260.

design may be registered in more than one class, and the registration takes effect from the date of the application. In case of doubt as to the class in which a design ought to be registered the Controller may decide the question.¹ An appeal is provided by sub-section (4) of the above section to the Governor-General in Council, in case of refusal of registration by the Controller. Under section 47 the protection afforded to a registered design is for five years only, renewable for two more periods of five years each, thus making the maximum number of years to be fifteen. This period, it will be observed, is shorter than that given by the Copyright Act, which is the life of the author and a period of fifty years after his death. Section 22, schedule I of the Copyright Act, lays down that that Act shall not apply to designs capable of being registered under the Patents and Designs Act except designs, which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process.

It is important to note the legal effect of disclosure of a design to any other person, dealt with in section 49. If disclosure is made by the proprietor to any other person under circumstances which would make it contrary to good faith for that other person to use or publish the design it shall not be deemed to be a publication of the design sufficient to invalidate the copyright, if registration thereof is obtained subsequently to the disclosure. So much with regard to disclosure by the proprietor himself. The effect would be the same if the disclosure of the design be made in breach of good faith by any person other than the proprietor of the design. Similarly, the acceptance of a first and confidential order of goods bearing a new and original textile design intended for registration shall not be deemed to be a publication invalidating the copyright if registration thereof is obtained subsequently to the acceptance.

Infringement of copyright in registered designs

¹ Section 44 gives liberty to the proprietor of the design which has been registered in one or more classes of goods to apply and have it registered in some one or more other classes.

Infringement of
copyright in regis-
tered designs.

is dealt with in section 53 of the Act. Infringement consists in (i) applying, or causing to be applied for the purpose of sale, to any article (in any class of goods in which the design is registered, the design or any fraudulent or obvious imitation thereof, or in doing anything with a view to enable the design to be so applied; or (ii) publishing or exposing or causing to be published or exposed for sale any article knowing that the registered design or any fraudulent or obvious imitation thereof has been applied to the article without the consent of the proprietor. The consequences of such infringement are indicated in sub-clause (2) of section 53, viz., the infringer may be restrained by injunction from repeating the infringement, or he may be ordered to pay damages, or both, in a proper suit filed for the purpose by the proprietor. The section also provides for a summary remedy, viz., that the wrong-doer has to pay to the registered proprietor for every contravention a sum not exceeding rupees five hundred recoverable as a contract debt, but the total sum recoverable in respect of one design shall not exceed one thousand rupees. Section 54 makes the provisions of the Act with regard to certificates of the validity of a patent and to the remedy in case of groundless threats of legal proceedings by a patentee, applicable to the case of registered designs (*vide* sections 32 and 36 of the Patents and Designs Act, 11 of 1911).

Rectification of
register.

The subject of remedies comprehends within it the rectification of Registers of Patents and Designs. Power is given to the Controller under the Act to effect such rectification under various circumstances. Section 62 provides for correction of clerical errors in connection with the registration of patents and designs. It further confers on the Controller the power to cancel the registration of a design either wholly or in respect of any particular goods in connection with which the design is registered. The question is on whose application the Controller can effect such cancellation or alteration of the entry in the register. The section itself as well as the prescribed form of application (Form No. 20) is silent on the point. But it has been held that the only person who can apply under section 62 is the registered proprietor or some

person in whom his interest is vested.¹ If the application for cancellation of entry is made by a person hostile to the registered owner and if the Controller misconceiving his jurisdiction cancels the entry, what relief is open to the person aggrieved? Section 64 provides that (1) a High Court may, on the application in the prescribed manner, of any person aggrieved by the non-insertion in, or omission from, the Register of Patents or Designs of any entry, or by any entry made in either such register without sufficient cause, or by any entry wrongly remaining on either such register, or by an error or defect in entry in either such register, make such order for making, expunging or varying such entry as it may think fit; (2) the Court may in any proceeding under this section decide any question that it may be necessary or expedient to decide in connection with the rectification of a register. It has been held that the terms of this section do not include the case of cancellation of an entry by the Controller. Once such cancellation is made, whether rightly or wrongly, the High Court has no power under the provisions of the Act to interfere with it. But under section 45 of the Specific Relief Act it can interfere when in the opinion of the High Court the doing or forbearing of any specific act by any person holding a public office, is consonant to right and justice.² Thus before it can direct the Controller to restore the entry the High Court has first to consider the case on the merits.

¹ *Ernest otto Gammeter v The Controller of Patents or Designs and another*, 22 C.W.N. 580; 4th I.C. 437.

² *Ibid.*

LECTURE VIII.

THE LAW OF TRADE-MARKS AND TRADE-NAMES.

The law of trade-marks of recent growth.

The law of trade-marks is a comparatively recent growth, the whole subject having developed during the last century. Marks, or symbols of authenticity have been used by traders at all times, ancient and modern. Signs or signboards, watermark upon paper, and other devices of a like nature are all more or less of the nature of trade-mark, or marks authenticating the genuineness or quality of the goods of a particular trader. While, however, marks or symbols were common in olden times, there were scarcely any actions for infringement of marks. These have come in the wake of commerce and competition and the development of trades and industries commanding wide markets. Occasionally in the days of old we find complaints made by traders of dishonest attempts on the part of rivals to deprive them of their legitimate profits by a colourable infringement of their trade-marks. An interesting specimen of this kind appears as far back as 1518 on a notice affixed to the edition of Alder's *Livy* published in that year. The following passage from the preface to the book will speak for itself: "Lastly, I must draw the attention of the student to the fact of some Florentine printers, seeing that they could not equal our diligence in correcting and printing, have resorted to their usual artifices. To Alder's 'Institutiones Grammaticae' printed in their offices, they have affixed our well-known sign of the dolphin wound round the anchor. But they have so arranged it that any person who is in the least acquainted with the books of our production cannot fail to observe that this is an impudent fraud; for the head of the dolphin is turned to the left, whereas that of ours is well-known to be turned to the right."¹ It is said that an action for the infringement of trade-mark lay as early as the reign of James I. In support of this proposition the case of *Southern v. How*² is sometimes

¹ Cited in Salaman on Trade-marks.

² Popham 144, Cro Jac. 971; Rolles 282.

cited. That was a case against a clothier who, it was alleged, had applied the mark of another clothier to his own ill-made cloth, and it was held that an action for deceit lay on that account. But it is doubtful whether the action was on the footing of infringement of trade-mark. One of the reports¹ has it that the action was brought by the owner of the mark. According to the other report,² the action was by the defrauded purchaser. In either case, however, it appears to have been treated as an action for deceit.

The various definitions of trade-mark that one comes across are mostly based on the statutory definition,³ only more or less amplified and elaborated. The essential principles, however, are well set out in the following definition by Mr. Upton, a learned American author: "A trade-mark is a name, symbol, figure, letter, form, or device, adopted and used by a manufacturer or merchant in order to designate goods that he manufactures or sells and to distinguish them from those manufactured or sold by another; to the end that they may be known in the trade as his, and thus enable him to secure such profits as result from an established reputation for superior skill, industry or enterprise, which sign, label, symbol, or words others have not an equal right to employ for the same purpose." A shorter definition is given by Mr. Coddington in his book on American Trade Mark Law. He defines trade-mark as "a name, symbol, figure, letter, form or device, adopted and used by a manufacturer, or merchant, to designate the goods he manufactures or sells and to distinguish them from the goods of another." The Indian Penal Code defines trade mark as a mark used for denoting that goods are the manufacture or merchandise of a particular person. This definition is adopted by the Indian Merchandise Marks Act (Act IV of 1889).

The principle on which the right of action for infringement of trade-mark or trade-designation rests ^{The principle stated} is so well stated in the famous dictum of James, L.J., that I cannot do better than give it in his own words: "No man," said he, in the case of *Singer Manufacturing*

¹ Popham p. 144; S.C. 79 Eng. Rep. 1244.

² Cro Jac. 471; S.C. 79 Eng. Rep. 402.

³ E.g. sec. 30 of Stat. 5 Edw. VII. C. 15

*Co. v. Loog*¹ "is entitled to represent his goods as being the goods of another man, and no man is permitted to use any mark, sign or symbol, device or other means, whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer. That being, as it appears to me, a comprehensive statement of what the law is upon the question of trade-mark or trade-designation, I am of opinion that there is no such thing as a monopoly or a property in the nature of a copyright, or in the nature of a patent, in the use of any name. Whatever name is used to designate goods, anybody may use that name to designate goods, always subject to this, that he must not, as I said, make directly or through the medium of another person, a false representation that his goods are the goods of another person." Lord Justice James calls it "a comprehensive statement of the law." So it is, but why it is to be regarded as such does not appear on the face of the dictum to the ordinary reader. A few words will make the position clear. A man may pass off his goods as the goods of another in various ways. One may imitate the symbol or mark which has been expressly adopted by another trader to identify his goods with himself and to distinguish them from those of others. This would be a case of infringement of trade-mark. Again, one may imitate any other symbol or symbols which have, in course of time, become associated with the goods of a particular trader, so as in fact to distinguish or identify them. One may content himself with imitating no more than the general appearance or "get up" of the goods of another trader. One may imitate the name under which another trader carries on his trade. All these would not amount to infringement of trade-mark, properly speaking; but they would all amount to conduct such as that indicated in the dictum of James, L.J. above quoted whereby a trader would succeed in passing off his own goods as the goods of another trader, which enjoy a reputation in the market.

It is, therefore, necessary to distinguish at the

¹ 18 Ch. D. 395 at p. 412; 52 L.J. Ch. 481.

outset two classes of cases. In one class, a sort of definite property right is set up in the use of a trade mark, and on an infringement of that right an action is brought. The other class arises out of conduct of any kind whatever which is calculated to pass off the goods of one trader as the goods of another¹ The former may be called trade-mark cases proper and the latter "passing off" cases. The first reported case in which the two classes were distinguished is that of *Singer Manufacturing Co. v. Wilson*² in which Jessel, M. R., thus drew the contrast between them: "The cases which have come before the court may, I think, be conveniently divided into two classes: the first class, which is the more numerous one, consists of cases where the goods manufactured are distinguished by some description or device in some way or other affixed to the article sold. It may be, as I said before, description, that is, it may consist of a name or names, or a lengthy description consisting of names with superadded words, and that description may be either affixed to, or impressed upon, the goods themselves by means of a stamp or an adhesive label, or it may be made to accompany the goods by being impressed or made to adhere to an envelope or case containing the goods. Now, as to this class, it is quite immaterial that the maker of the goods, to which—what I will call for the sake of shortness—the trade-mark is affixed did not know that it was a trade-mark and had not the slightest intention of defrauding any body. The second class of cases are of a totally different character; they are always cases of fraud.' They are cases where the defendant, without putting any trade-mark at all, on his goods, or putting a trade-mark which is admittedly different in substance from the trade-mark, if any, of the plaintiff on the goods, has represented the goods as being goods manufactured by the plaintiff. What the defendant has said or done must amount to a representation that the goods to be

Trade-mark and
passing off cases
distinguished

¹ When one knowing that goods are not made by a particular trader sells them as and for the goods of that trader, he does that which injures that trader—*Per* Lord Blackburn, *Singer Manufacturing Co. v. Loog* (1892) 8 A.C., p. 29.

² 2 Ch. D. 434; 1874, 45 L.J. Ch. 490.

³ A similar view was expressed in the case of *Cheavin v. Walker* (1876) 5 Ch. D. 850 before the decision by the House of Lords mentioned later.

sold are the goods of the plaintiff, or that they are manufactured by the plaintiff. What amount of representation will be sufficient for that purpose must again depend, of course, on the facts of each particular case."

The view expressed by Sir George Jessel that in the second class of cases the presence of fraudulent intention is essential to relief, although approved by the court of appeal, was not accepted by the House of Lords. There it was laid down that no difference in point of principle exists between the two classes of cases. As Lord Cairns observed, since the decision in *Millington v. Fox*¹ it is necessary either to aver or to prove fraud: "The question" said he, "must as it seems to me, be: 'Are the advertisements of the defendant, having regard to the evidence in the case, calculated to mislead an unwary purchaser.'" Thus it is settled law now that even where there is no infringement of a trade-mark or of any mark attached to any goods, a trader will not be allowed to "pass off" his goods as the goods of another; whether such conduct on his part is intentional or not does not affect the question; all that is necessary to inquire is whether the trader has acted in such a manner as to lead, or as is calculated to lead, to deception.² In the case of *Turton v. Turton*³ the position was accepted and further elucidated by Cotton, L.J., who said: "No man must pass off his goods as the goods of another.

* * * * Of course, that may be done unintentionally; but where there is a manifest and natural meaning in the words used that the goods are the goods of somebody else, and the man who uses those terms uses not his name only, but somebody else's, he would be stopped from doing so as soon as he is aware of the facts which make the *prima facie* intention and result of what he is doing, passing off

¹ 3 My. & Cr. 338. s.c. 40 Eng. Rep. 956.

² *Hugh Balfour & Co. v. Edward, Dundas, Kilburn & Co.* 1 Hyde 270.; *Ewing & Co v. Grant Smith & Co.* 2 Hyde 185; *Badische Aniline Und Soda Fabrik v. Maneckji Shapurji Kairak* I.L.R. 17 Bom. 584; *Abdul Salam v. Hamidulla* 15 I.C. 116; *Byramji Cowasji v. Vera Samabhai Motibhai* 36 I.C. 965; *Khetra Pal v. Pancham Singh* I.L.R. 37 All. 446 (case of infringement by advertisement); *Balladin v. Puraanmull* 30 I.C. 633; *Madhavji Dharamsey Manufacturing Co., Ltd. v. Central India Spinning Weaving and Manufacturing Co., Ltd.* I.L.R. 41 Bom. 49.

³ (1899) 42 Ch. D 128.

his goods as the goods of somebody else. It was formerly said that no action could be maintained unless a man had done so fraudulently and intentionally; but when he finds out that the natural construction of what he is doing, when the facts are known, is to represent his goods to be somebody else's, then he should be stopped, even though he had originally done that unintentionally and innocently."¹

To turn to the first class, that is, the cases which turn on the alleged infringement of a trade-mark. In the words of Lord Westbury² the word 'trade-mark' is the designation of the marks or symbols, as and when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called property." The essence of the right is the reputed association in the market of the particular mark or symbol with the goods of the plaintiff.' It is, therefore, essential to prove user of the mark by the plaintiff, and further that the mark is reputed to be the plaintiff's. In some cases it may so happen that a trade-mark is so completely personal to a particular individual as of necessity to import that the goods bearing the mark or the name have been manufactured by him or under his supervision. The Supreme Court of Massachusetts expressed the principle involved in such cases in the following terms: "There may no doubt be cases where the personal skill of an artist or artisan may so far enter into the value of a product that a trade-mark bearing his name would, or at least might,

Infringement of
trade marks

¹ Ibid, at p. 141. Even an innocent carrier of infringing articles is not protected. *Upmann v. Elkan* (1871) L.R. 7 Ch. A.C. 130. See also *Beard v. Turner* 13 L.T.N.S. 746

² *The Leather Cloth Co. v. The American Leather Cloth Co.* 4 De. G. J. and S. p. 142, (1863) L. J. Ch. 199 s. c. 46 Eng. Rep. 868. See also *Ford v. Foster* (1872) L.R. 7 Ch., p. 616, where Bacon, V.C., describes a trade mark as follows:—"The meaning and use of a trade-mark is that the same person dealing in goods, no matter of what kind, whether of his own manufacture or not, having a certain defined shape, if he stamps upon them some indication that that particular article is his and his only, may thereby acquire so far an exclusive right to it that no man may imitate his mark, and the legal right goes no further than that" See also *Abdul Cadur Alibhoy v. Mahomedali Hyderabad*, 3 Bom. L.R. 220 which lays down that where a person uses a label which is a deliberate combination of other registered labels with a view to represent and sell his wares as the wares of others cannot be allowed to take out an injunction restraining some other person from imitating his label. This is on the principle that a plaintiff must come into a court of Equity with clean hands.

³ *Graham & Co. v. Kerr Dodds & Co.* 3 B.L.R. App. 4; *Karam Elahi & Co. v. Abdul Aziz* 4 I.C. 968; *Vadilal v. Burdett & Co.* I.L.R. 30 Bom. 61

imply that his personal work of supervision was employed in the manufacture; and in such cases it would be a fraud upon the public if the trade-mark should be used by other persons.'"¹

No registration of
trade marks in Eng-
land up to 1875.

Up to the year 1875, there was no registration of trade-marks in England, and in every case of infringement of trade-mark a good deal of evidence had to be gone into to prove such user and reputation. On the other hand, the defendant frequently contended that what was alleged to be the plaintiff's trade-mark was really a mark common to the trade, or that there was nothing 'distinctive' in such mark or symbol, or that it was merely descriptive in character, and that as such no one could claim exclusive use of it. In 1875 the Trade Marks Registration Act was passed, which provided that registration should be *prima facie* evidence of the right of the registered proprietor to the exclusive use of the trade-mark, such right to be limited to the goods of the class for which it was registered.² The act practically made registration of trade-marks compulsory in England in as much as it provided that no one should be entitled to institute a proceeding to prevent the infringement of a trade-mark, unless such trade mark was registered in pursuance of the Act. This was followed by the Act of 1883 (The Patents, Designs and Trade Marks Act) which substantially re-enacted the principal provisions of the Act of 1875 and made some necessary additions and alterations. An influential committee was then appointed, under the presidency of Lord Herschell, and with a view to carry out their suggestions an amending Act was passed in 1888 which came into operation on the 1st January, 1889. The latest important piece of legislation in England is the Trade-Marks Act of 1905, section 9 of which indicates the essential particulars of a registrable trade mark to be at least one of the following:—(1) The name of a Company, individual or firm represented in a special or particular manner; (2) the signature of the applicant for registration or some

¹ *Honie v. Chavey* 153 Mass 592, cited in *Jagernath & Co. v. Cresswell and others* 11 L. R. 40 Cal. 814 at pp 827, 828.

² It also provided that after the expiration of five years it would be conclusive evidence of such right provided that the proprietor of the mark remained the owner of the good will of the business in which it was used.

³ 46 and 47 Vict C. 57.

predecessor in his business; (3) an invented word or invented words, (4); a word or words having no direct reference to the character or quality of the goods and not being according to its ordinary signification a geographical name or surname. Any other distinctive mark, save a name, signature, or word or words other than such as fall within the description in the above paragraphs (1, 2, 3, 4) shall not, it is provided, except by order of the Board of Trade, or the Court, be deemed a distinctive mark.

Thus in England, under the statute law, registration of trade-marks is essential, in as much as it is a condition precedent to proceedings for infringement. Yet there are many trade-marks still unregistered, the reason being that the remedies by an action for "passing-off" are available to the person aggrieved, and such action does not require registration as an essential condition. In India there is no system of registration, nor is there any provision for a statutory title to a trade-mark. The rights and liabilities in connection with trade-marks are determined in accordance with the principles of the common law of England.¹ The law, therefore, stands as it did in England before the registration acts were passed, and the numerous decisions which have since been given in England and followed in India have elaborately defined the rights and remedies attaching to traders and their trade-marks. It is the adoption and user of a trade-mark which gives a title to it. As soon as a trade-mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the property of the firm. The actual length of time it has been employed is not an essential ingredient² provided it has been used long enough to render it probable that a reputation in the market has been acquired. But the right, it must be remembered, avails only in respect of the goods of the particular class to which the mark has been attached. The acquisition of an exclusive right to a mark or

In England registration is essential

In India adoption and user gives title

¹ *British American Tobacco Co v. Mahbub Baksh* I.L.R. 38 Cal. 110 at p. 117; *Hannah v. Juggernath & Co.* I.L.R. 42 Cal. 262 at p. 275

² *Lavergne v Hooper* I.L.R. 8 Mad. 149; *Jagannath & Co. v. Cresswell and others* I.L.R. 40 Cal. 814.

name in connection with a particular article of commerce cannot entitle the owner of that right to prohibit the use by others of such mark or name in connection with goods of a totally different character.¹ An action is maintainable not only by the manufacturer or selector of the goods but also by the vendor of them. In the case of *Jwala Prosad v. Munna Lal Serowgee*,² the plaintiff, who carried on business in Calcutta as a merchant in *ghee* (clarified butter), sued the defendant who also carried on business as a dealer and commission agent in *ghee*, for infringement of his trade-mark. It was alleged in the plaint, and established by the evidence, that for a considerable time (twelve years) the plaintiff's *ghee* had been sold in Calcutta and foreign markets, tinned in canisters bearing his embossed mark, which consisted of a flower on a stem with leaves, the flower being of the shape of an ellipse with an indented circumference, having within its circumference the initials of the plaintiff's firm M.D.S. The infringement was said to consist in the fact that the defendant had used on their canister of *ghee*, intended for sale and export in the same markets, a colourable imitation of the plaintiff's mark; and that the use by the defendants of that mark was calculated to deceive, and it had deceived, by inducing purchasers to buy the defendant's goods in the belief that they were buying those of the plaintiff. There were two points that came up for disposal. First, the plaintiff's mark was described as a registered trade-mark. Evidently, the contention was based on the fact that although there was no law for registration of trade-mark in India, yet a large number of trade-marks used to be deposited with the Registrar of Assurances appointed under the Indian Registration Act. It was held that there was no system of registration in India which gave a statutory title,³ and that, therefore, it was necessary for the plaintiff to establish that the mark, in respect of which he made his claim, had acquired a reputation in connection with the goods that he sold. On this

¹ *Badisch Amiline etc. v. Tejpai, etc.*, 5 Bom. L.R. 1025.

² I.L.R. 37 Cal. 204, on appeal from 35 Cal. 311; 5 I.C. 1000.

³ *Per Jenkins, C.J.*, I.L.R. 37 Cal., p. 209. See also *The British American Tobacco Co., Ltd. v. Mahoob Bux*, I.L.R. 38 Cal. 110, 7 Ind. Cas. 279.

point both the original court and the court of appeal held that the mark in question did denote in the market the *ghee* of the plaintiff, and that the defendants deliberately adopted the plaintiff's trade-mark for their own purposes.¹ Secondly, it was objected that the plaintiff was merely the vendor of the goods and not the manufacturer nor selector. It was held that even though the plaintiff was not the manufacturer, nor the selector but only a vendor of the goods, his action was maintainable.²

But a trade-mark which represents the reputation of the manufacturer and not of the importer is under the control and protection of the former and not of the latter. The importer cannot under the circumstances be aggrieved at any use of the trade-mark which obviously belongs not to himself but to the producer. The importer can only protect a mark indicating importation by him. If his importation is not indicated by the mark but otherwise, as for instance by the style and name under which he trades as importer, he cannot sue to restrain the use of the mark, and can only sue if his trade name and style be deceitfully assumed by a rival. So where the trade-mark on certain watches was the trade-mark of the manufacturers and exporters, and the plaintiff's connection with the watches was that of an importer and seller under a contract for exclusive supply in India, and where he sought a perpetual injunction to restrain the defendants from importing or selling any watches similar in appearance to the watches imported by himself or having any design or mark calculated to deceive purchasers into the belief that such watches were the watches imported and sold by the plaintiff, it was held that he was not entitled to the injunction asked for. In order to succeed, the plaintiff would have had to show that the value of the trade which he carried on was due to the reputation acquired by, and attaching to the trade-mark, as a guarantee of importation by him, and not merely as a guarantee of manufacture by somebody else, and that the limitation of that trade-mark was an infringement of an

¹ See *Mahomed Esuf v. Rajaratnam Pillai* I.L.R. 33 Mad. 402.

² *Per* Woodroffe, J., I.L.R. 37 Cal. at p. 211.

Action by
importers.

exclusive right of his own, entitling him to ask for protection.¹

In India for obvious reasons cases of "importers" of trade-marks are more numerous than those of producers or manufacturers. In the case of *Ralli v. Fleming*² it was held (*per* Markby, J.) that it was only an extension of the general law of trade-marks that the right to the exclusive use of a trade-mark may be claimed as well by a trader who only imports goods as by one who manufactures. When a trader specially selects and appropriates to himself, for the purpose of distinguishing his goods, any device, it is his trade-mark proper, and no one else is allowed to use it. Again, if without any such selection and appropriation, the trader's goods happen to bear some mark which has come to be associated by the public with the trader's name so that all the goods with the mark are supposed to come from him, then too the law will not allow any one else to use it. It was further held that where the use or the imitation of the plaintiff's marks, on goods not imported by him, by the defendants would be calculated to deceive or mislead the public into the belief that they were purchasing goods imported by the plaintiff the defendants ought to be restrained from such imitation. The case of *T. Barlow and others v. Gobindram and another*,³ which was also for infringement of an importer's trade-mark further establishes this point. There the plaintiffs alleged that they were entitled to the exclusive use of the number 9000 as a mark for distinguishing a particular variety of cloth imported by them and complained against the unauthorised use of the number by the defendants in respect of cloth not imported by the plaintiff. It was held that the question of the right to the exclusive use of a trade-mark or trade number is largely, if not entirely, a question of fact; and the question whether it exists in any given case must depend upon whether the evidence in that case is sufficient to show such an association or connection between the mark or the number and the firm which uses it as to indicate to the ordinary purchasers in the

¹ *Heminger v. Droz* 3 Bom. L.R. 1; 1 I.L.R. 25 Bom. 433.

² I.L.R. 3 Cal. 417; 2 C.L.R. 93.

³ I.L.R. 24 Cal 364, 1 C.W.N. 281.

market that the goods are the goods of that particular firm. To show that a particular trade number has acquired a reputation in the market and that purchasers buy the goods by that number and not from an examination of the nature or quality of that cloth, is not sufficient to establish the right of exclusive user of that number. There must be such an association between the number and the firm's name as to indicate in the understanding of the public that the goods bearing that number came from that particular firm. The right of exclusive user of a name, or a number, as a trade-mark is not an absolute and unqualified right which would entitle the owner to prevent another person from using it under all circumstances. It is only when the use of that name or number deceives or is reasonably likely to deceive the public, that it can be interfered with or prevented.¹ There must be a reasonable probability of purchasers being deceived; it is not enough to show a mere possibility of deception.² At the same time it should be remembered that it is not necessary for relief in equity that proof should be given of persons having been actually deceived and having bought goods with the defendant's mark under the belief that they were goods manufactured or imported (as the case may be) by the plaintiffs. As laid down in numerous cases, what one has to look at, in cases of colourable imitation of trade-marks, is not whether a critical and astute purchaser seeing the two labels or marks side by side would be able to detect the difference, but whether the distinctive and characteristic symbol is the same in both cases, so that one is likely to be taken for the other. It is immaterial whether there are slight differences which could be detected on a close scrutiny. Trade-marks appeal for the most part to the illiterate classes who are unable to read or would be unlikely to spell out the description round the border.³

Another interesting case is that decided by the

¹ *Uberoi Ltd. v. The Proprietor of Uberoi & Co. Kashmir* (1920) 56 I.C. 709.

² I.L.R. 24 Cal. at p. 379.

³ *E. D. Sassoon v. D. L. Mills Co.* 1 Bom. L.R. 291. See also I.L.R. 24 Cal. p. 379: "If it can be shown that such use was intended to deceive the ordinary or unwary purchaser into the belief that the goods were imported by the plaintiff, or that such use would render it reasonably probable that the purchaser would be so deceived."

Full Bench of Madras¹ in which several points came up for discussion and the law was clearly laid down. The plaintiffs and the defendant were carrying on business as piece goods merchants at Madras. The plaintiffs complained that the defendant infringed their trade-mark on grey shirtings which they (the plaintiffs) were importing from England. The plaintiffs claimed the exclusive right to the user of a combination of certain words, designs, letters and numbers which constituted the 'facing' imprinted on their grey shirtings. It was proved that the plaintiffs were using this facing continuously, and without alteration since 1889. It was also proved that in, and prior to, 1889, there was no similar 'facing' in use in Madras and that the goods bearing the 'facing' and sold by the plaintiffs had acquired a large reputation and were known in the market as "*tulwa*" or "*kuttee*" shirting, the word "*kuttee*" meaning sword. The plaintiffs claimed that their trade mark consisted of the whole combination forming the facing on their grey shirtings. It was found that, since 1898, the defendant was, with the object of overthrowing the plaintiffs, effecting some change or other in his facing from time to time with the result that in the end his facing came to be almost exactly similar to that of the plaintiffs in the words, letters and figures, etc., except that the defendant had imprinted on his facing scent bottles lying horizontally instead of swords lying in the same position on the plaintiffs' facing. In short, the various marks used by the defendant constituted a colourable imitation of the plaintiffs' marks in every respect apart from the swords. The defendant's contention was that the plaintiffs' goods had been known as "*kuttee*" or sword shirtings. That being so, he could copy every portion of the plaintiffs' trade-mark except that which gave the special name to the cloth; in other words, that he could copy every part of the combination of the plaintiffs' trade-mark, except the words from the use of which the plaintiffs' shirtings had acquired the reputation of the 'sword'

¹ *Noorooddeen Sahib v. Charles Sowden* 15 M.L.J. 45 F.B. See *Thomas Arthur Taylor v. Virasami Chetty and another* I.L.R. 6 Mad. 108 referred to in the Full Bench Case.

or 'kuttee' shirting, and that as he (the defendant) used scent bottles instead of swords on his facing there was no infringement of the plaintiffs' trade-mark and, therefore, the plaintiffs could not get relief by way of injunction, etc., which they sought. It was held, Davies, J., dissenting, that the plaintiffs were entitled to the injunction prayed for. The action, said Davies, J., was not upon a trade-mark properly so called, as there is no registration of trade-mark in this country but it was upon the right of an exclusive user of what might be more appropriately styled a 'trade description' which is recognised and protected under secs. 2, 4 and 6 of the Indian Merchandise Marks Act of 1889. To establish the user of trade-mark, it is necessary for the claimant to show that it is by that particular marking that his goods are known or recognised in the market or by the public. He must also show that the marks, as arranged by him indicate origin of property as well as quality. This the plaintiffs failed to prove. Except as to four items, the plaintiffs did not make out their right of exclusive user and the defendant did not imitate any of those marks. Further, what the defendant copied he was at liberty to copy and no one was likely to be deceived thereby into taking his goods as the plaintiffs'. Benson, J., observed: There is no system of registering trade-marks in India. Every one may use any mark or combination of marks or symbols that he likes, unless some other person has, by user acquired a reputation which couples his name with the mark or combination of marks or symbols. In that case, the user acquires a property in the mark or combination which the law will protect just as much as if it were a registered trade-mark. To that extent, it becomes his exclusive property and no one else has a right to copy it, or even to appropriate any part of it, if, by such appropriation, unwary purchasers may be induced to believe that they are getting goods which were made by the firm to whom the trade-mark belongs. For several years previously, the plaintiffs had acquired by user a property in their facing. Moore, J., said: "The principle of law applicable to a case like the present is that no man may canvas for custom falsely holding out his

goods or business, whether by misleading description or by colourable imitation of known marks, packages, etc., as being the goods of, or business of, another." Its application is not excluded by showing that the style or words appropriated by the defendant are in themselves not false as he uses them, or that the plaintiffs if they succeed will have a virtual monopoly in an exclusive designation which is not capable of registration as a trade-mark. The question is whether the defendant's action naturally tends to cause an ordinary dealer or purchaser to think he is dealing with the plaintiffs or buying the plaintiffs' goods. In the present case there could be no doubt that the facing of the defendant would appear to the purchaser as virtually identical with that of the plaintiffs'. The object of the defendant in adopting the facing he did must have been to cause an ordinary illiterate purchaser to think that he was buying the plaintiffs' goods. It was further held unanimously that evidence of opinion as to the probability of the purchaser being deceived or otherwise was not admissible.

Prior user of a
trade mark outside
India.

The effect of prior user of a trade-mark outside India in granting immunity from action came up for consideration in the case of *Ebrahim Currim v. Essa Abba Sait*.¹ In that case the plaintiff, an importer of umbrellas with a certain trade-mark, sued for an injunction restraining the defendant from importing and selling umbrellas with a trade-mark having a similar device. The plaintiff contended that the trade-mark of the defendant was likely to deceive the public into a belief that the umbrellas sold by the defendant were those of the plaintiff. The defendant while denying that the plaintiff had any right to the trade-mark claimed by him, contended that his trade-mark had been long used in Scotland, and that the public were not likely to be deceived. For the purpose of the suit it was taken for granted that the mark in question was used by the firm in Scotland before it was used by the plaintiff in India and that it had not been used in India by the Scotch firm before. It was held that the prior use in Scotland did not justify the Scotch firm or the defendant in saying

¹ I.L.R. 24 Madras 163.

that plaintiff's use of the trade-mark was illegal, or otherwise than an exclusive user. The protection which the law affords to traders using a trade-mark would be seriously diminished if immunity from action were secured to rival traders who were able to prove that in some other quarter of the globe, some other trader had been in the habit of using the mark for a period longer than that alleged by the plaintiff.

A particular trade-name bearing on the face of it a particular signification may, in course of time and as a result of association with the name and goods of a particular trader, acquire a secondary signification.¹ In that case, it will not be open to any other trader to use it in its primary signification on his own goods, because that may lead to deception. This question came up in the case of *John Smidt v. F. Reddaway & Co.*² The plaintiffs F. Reddaway and Co., were manufacturers of machine belting. Since 1889 they had manufactured and sold in England, India and the colonies a belting of their manufacture under the name of 'Camel Hair Belting,' 'Camel Brand Belting' or 'Camel Belting' which, they said, had a very valuable trade reputation. They also alleged that the name 'Camel Hair Belting,' 'Camel Brand Belting' 'or Camel Belting' or all belting invoiced, sold or advertised in connection with the word 'Camel' was understood in the trade and by the public to mean and indicate exclusively belting of the plaintiffs' manufacture. The defendants were a firm of merchants carrying on business in Calcutta with headquarters at Bremen in Germany. They imported into India machine belting of German manufacture which they placed on the market under the name of 'Camel Hair Belting' or Schroder Smidt and Co.'s 'Camel Hair Belting.' The plaintiffs sought to restrain the defendants from using the words 'Camel Hair' whether alone or in conjunction with the names or in any manner likely to deceive purchasers in connection with belting advertised or offered for sale by them and not being of the plaintiff's manufacture. The

Primary and
secondary signifi-
cation of a trade
name

¹ *Oriental Government Security Life Assurance Co., Ltd. v. Oriental Assurance Co., Ltd* (1913) I.L.R. 40 Cal 570.

² I.L.R. 32 Cal. 401, 9 C.W.N. 281; following *Reddaway v. Banham* (1896) A.C. 199

issues framed were these: (1) Does Camel Hair Belting mean belting made by the plaintiff company? (2) Or does it mean belting of a particular kind without reference to any particular maker? (3) Do the defendants so describe their belting as to be likely to mislead purchasers and to lead them to buy the defendant's belting as and for the belting of the plaintiff company? (4) Did the defendants endeavour to pass off their goods as and for the goods of the plaintiff company so as to be likely to deceive purchasers? It appears that the defendants had carefully confined to India their denial of the plaintiffs' claim as to the exclusive meaning attached to the words 'Camel Hair' for upon the decisions in England, specially the judgment of the House of Lords in *Reddaway v. Banham* it could hardly be disputed that the words 'Camel Hair' or 'Camel Brand' or 'Camel' used in connection with belting had acquired in England a distinctive signification indicating belting manufactured by the plaintiff company. The question for consideration in the case was whether it had acquired any such meaning in India. The case was decided by Ameer Ali, J., who held in favour of the plaintiffs and granted an injunction in the same terms as had been granted in *Reddaway v. Banham*.¹ On appeal, the decision of Ameer Ali, J., was upheld and the conclusion arrived at was that the words 'Camel Hair Belting' had acquired a special or secondary signification in the Indian market,² meaning that the belting so called was belting of the plaintiffs' exclusive manufacture; that under the circumstances since the name 'Camel Hair Belting' had come to mean in the Indian market the plaintiff's belting and nothing else, a purchaser would be likely to be deceived when buying the defendants' belting into believing that he was buying Reddaway's, and further that it was immaterial to prove that any special damage was caused to the plaintiff or that any purchaser was in fact deceived.³

On the question of deception the case of *John*

¹ (1896) A.C. 199.

² The burden of proving that particular words have acquired a secondary signification lies on the person alleging it.

³ See *Morarji Mohanji v. Madanji Mohanji and others* 5 Bom. L.R. 545.

Smidl v. Reddaway was referred to with approval by Sale, J., in *Nemi Chand v. C. W. Wallace and others*¹ Counterfeit trade-mark. The latter was a case of slander of title and the plaintiff alleged that the defendants by a false statement maliciously made with the intention of causing his goods to be wrongfully detained, did in fact cause the goods to be wrongfully detained by the customs authorities. The issue to be determined between the plaintiff and the defendant was whether the plaintiff's marks were counterfeit as alleged by the defendants or not. "A counterfeit trade-mark," said Sale, J., "may be defined as a trade-mark which is either designed and used with the intention of deceiving or which by reason of its resemblance to another pre-existing and already established mark is calculated to deceive apart from any dishonest intention. In order to succeed in establishing the first proposition the plaintiffs must shew that in introducing and using their trade-mark they were not actuated by any intention to imitate the trade-mark of Messrs. G. and R. Dewhurst. If the plaintiffs fail to shew that they had no such intention, it becomes idle and unnecessary to enquire whether the imitation was calculated to deceive and for this obvious reason. The resemblance must have been either designed or innocent and accidental, and whether it was the one or the other the plaintiffs alone know, and can prove if they will. If they, having the opportunity, deliberately abstain from shewing that the resemblance adopted by them was accidental and innocent it necessarily follows that it was the result and outcome of deliberate design and intention. If then the court must on the facts before it presume that the marks of resemblance between the plaintiffs trade-mark or combination and the defendants' trade-mark or combination are not accidental but intentional and designed, then the imitation must have been designed with the object of deceiving. And if the object was to deceive, then the court will presume as against the wrong-doer that the means employed to cause deception were calculated to effect that purpose. This I think is the effect of the ruling

¹ 4 C.L.J. 268 at p. 282; 10 C.W.N. 107. There was an appeal and the judgment was upheld. See 11 C.W.N. 537; I.L.R. 34 Cal. 495.

of this court in the case of *John Smidt v. Reddaway*. It follows from this reasoning that if the plaintiffs imitated the whole or part of Dewhurst's mark with the object of deceiving, the court will presume as against the plaintiffs that the imitation so adopted was calculated to deceive."

Likelihood of
deception-expert
opinion.

There was another vexed question which came up for discussion in the above case, viz. whether the opinion of experts or men in the trade can be considered in order to come to a conclusion whether or not a combination is such as is calculated to deceive the purchaser. It was held that that is a question entirely for the Judge and no evidence of opinion may be given. But evidence of facts which may assist the Judge to come to a conclusion as to whether one mark is a colourable imitation of another may be given. The question arose thus: During the examination-in-chief of one of the witnesses for the defendants the following question was put: 'Did you come to any conclusion with regard to this cloth (which had been imported by the plaintiff)?' To this the following answer was given. 'Yes. This is obviously intended to be an imitation of Dewhurst's cloth.' Counsel for the plaintiff objected saying that no questions could be asked as to the opinion of witnesses as regards resemblance and that the eye of the Judge was the sole test. Counsel for the defendant urged among other things that such questions could be asked, if not on any other ground, at least on the ground that it was not a passing-off action, but an action for slander of title and that he was entitled to get the conclusion of persons similarly situated to show *bona fides*. The court gave a short separate judgment on the point,¹ which I give below *in extenso* :—

"The question which is sought to be put and which is objected to is to elicit witness's opinion as to whether or not the plaintiff's combination is not such as is calculated to deceive the purchaser who wanted to buy the defendant's goods. The objection is based on the view taken by Lord Halsbury in the case of *North Cheshire Brewery Co. v. Manchester Brewery Co.*² There Lord Halsbury points out that where the question is

¹ 4. C.L.J. at p. 279.

² 1899 A.C. 83.

a question as regards one combination being a colourable imitation of another, certain questions are admissible. Then he goes on to say that another class of evidence, i.e. based on the opinion of witnesses, viz. whether one mark is a colourable imitation of the other cannot be given, because this is the very question which the Judge has to decide. The language is very explicit. He says, "but upon the one question which your Lordships have to decide whether the one name is so nearly resembling another as to be calculated to deceive, I am of opinion that no witness would be entitled to say that and for this reason: that that is the very question which your Lordships have to decide." It is not possible to distinguish the question put to the witness in this case from the question which is considered by Lord Halsbury. But it is said that this action is not a passing-off action, but an action of deceit. It is submitted that the question is admissible to show that the defendants acted honestly and *bona fide*. It would be embarrassing, I think, to admit evidence which is inadmissible on one issue, on another issue. If the court is not to have the advantage of the witness's opinion as to resemblance, it is difficult to see why the court should insist on it to show the absence of malice. The principle must be that if the court is competent to come to a conclusion on one issue, it is competent to come to a conclusion on another issue. Under these circumstances, in as much as the plaintiff has objected, I follow Lord Halsbury in saying that this kind of evidence is not admissible. Evidence of facts which may assist the Judge to come to a conclusion whether one is a colourable imitation of the other, or whether the defendants are acting *bona fide* may be given. The question is, therefore, inadmissible."

As to the evidence of the circumstances under which the goods come into the hands of the purchasers and how it may affect the question of likelihood of deception, the following observations of Sale, J., in the same case will repay careful perusal:—

"What about these ignorant purchasers? They do not have the opportunity of comparing the two combinations together and being, it may be assumed, for the most part unable to read English, they would

Likelihood of deception—evidence of circumstances.

make little of the opportunity if they had it. The only comparison a purchaser of this class could make would be between the combination of marks on the piece of shirting offered to him and his probably very hazy and imperfect recollection of the combination appearing on the goods he had been in the habit of purchasing. If the purchaser on making this comparison was shrewd enough to detect differences, might he not justly conclude, as was pointed out by Lord Selborne in the case of *Johnston v. Orr Ewing*,¹ that these variations had been made by the owners themselves for reasons of their own? How then can the Judge comparing these combinations in court answer for the ignorant purchaser in the mofussil as to the effect on his mind of the plaintiff's combination which is presented to him under totally different circumstances? Before the Judge can deal with the question as to the likelihood of deception of any given combination, there must be evidence of the circumstances and conditions under which the goods come into the hands of the purchaser for whose guidance the combination is intended and how he regards and is affected by the marks stamped upon the cloth he buys. In the case of the plaintiff's grey shirtings the practice is to stamp each piece with their combination. Therefore, the question of likelihood of deception is important as regards the purchasers of the single pieces and not so much as regards the purchasers of the entire bale. The importance of this class of evidence in supplementing the effect produced on the Judge's mind by a comparison of the combination is all the greater, as the rule now laid down is a departure from the old practice prevailing at the time when the cases of *Johnston v. Orr Ewing* and the *Singer Manufacturing Co.* were decided which permitted opinions of experts being given to assist the Judge in arriving at a conclusion on the question; see *North Cheshire Co. v. Manchester Brewery Co.*"²

In appeal the judgment of Sale, J., was upheld, and the court of appeal following *re Christiansen's Trade Mark*.³ *Johnston v. Orr Ewing*⁴ and *Singer Manu-*

¹ (1882) L.R. 7 A.C. 219.

³ (1866) 3 R.F.C. 54.

² 4 Ch. J. 268 at p. 285.

⁴ (1882) L.R. 7 A.C. 219.

*facturing Co. v. Loog*¹ held that in order to arrive at a conclusion as to whether a trade-mark is a colourable imitation of another or not, the court may look at the two marks in question with its own powers of forming an opinion, accompanied by the evidence in the case. It has to consider whether the mark is calculated to deceive incautious, ignorant or unwary purchasers.²

An important question often arises in connection with alleged infringement of a trade-mark and that is whether the circumstances show that there has been an abandonment of the trade-mark by the plaintiff and whether in that case he can still claim any exclusive rights in regard to it. This question came up for determination in the case of *The West End Watch Co. v. The Berna Watch Co.*³ The plaintiffs trading under the name and style of the West End Watch Co. imported watches into India as sole agents of a factory in Switzerland established at St. Imier. Those watches had printed on their dials a device and the words "Berna" and "West End Watch Company" and they came to be known in the Indian market as the 'Berna Watches.' The factory at St. Imier subsequently passed into the hands of the defendants. A dispute having arisen between the plaintiffs and the defendants as to the quality of watches manufactured by the latter, the plaintiffs discontinued to send orders to the defendants and began to import watches made at other factories. In the advertisements issued by the plaintiffs since that time as well as in answer to letters received by them from their constituents, they declared that owing to deterioration in the making of the Berna watches, they had discontinued to import them, and had substituted instead a new quality styled the 'Secular' or the 'Railway Service.' The defendants who had incorporated themselves under the name and style of the Berna Watch Co.,

Abandonment of a trade-mark

¹ (1882) L.R. 8 A.C. 15.

² I.L.R. 34 Cal 495, 11 C.W.N. 537. *Abdul Salom v. Hamidulla*, 15 I.C. 116.

³ *Jagannath and Co. v. Cresswell and others* I.L.R. 40 Cal. 814, following *Laverne v. Hooper*, I.L.R. 8 Mad. 149. "As the right to a trade-mark may be acquired, so it may be abandoned. As there is no length of time required for the acquiring of a right to a trade-mark, in like manner apart from statutory law there is no length of time required to constitute an abandonment."

⁴ 13 Bom. L.R. 212.

opened an office in Bombay, and issued a circular in which they referred to the plaintiffs as their agents who had sold six hundred thousand watches made at the St. Imier Factory, and proclaimed that Berna Co.'s watches would no longer be sold by the plaintiffs as their sole agents, as they had decided to deal directly themselves. The plaintiffs filed this suit to restrain the defendants from using and imitating various trade symbols alleged to belong to the plaintiffs and from representing that the defendant's business was the business carried on by the plaintiffs. It was held, on evidence, that as the plaintiffs had for three years preceding the suit, both in their dealings with the new factories and with their customers, evinced the intention to abandon the name 'Berna' as a quality mark for their watches, they could not claim any exclusive title to the use of that name either alone or in a trade-mark with a symbol. It was further held that the plaintiffs were entitled to an injunction restraining the defendants from representing that they were carrying on business of which the plaintiffs were the sole agents or were the successors in business of the plaintiffs. Where a trade-mark has up to the date of the suit been associated in the minds of the buyers in a particular country with a particular kind of commodity sold by the plaintiff, then, unless there is an abandonment of the trade-mark by him, he is entitled to an injunction against any other person importing and selling the commodity under that name, notwithstanding that the plaintiff's name has, in addition to the word or trade-mark, always appeared on the article sold and is well known to all dealers. The importer who by advertising and pushing the sale of goods under a particular mark, secures a wide popularity in relation to the goods sold by him, is entitled to the protection of the court for that mark in the country of importation even against the producer of the goods. The fact that the user of a word or mark always uses it in conjunction with his own name is not conclusive to show that the word or mark cannot be claimed as a trade-mark or that the user has waived his rights in it as a trade-mark. There can be no property in a trade mark in gross, apart from the goods of which it has become the symbol.

After a brief survey of the important Indian cases on trade-marks we are now in a position to consider some of the leading English cases which form the basis of the law on the subject. For this purpose, one must recall to mind the essential particulars of a registrable trade-mark as provided by s. 9 of the Trade Marks Act of 1905, which is only a revised version of the corresponding section (section 10) of the Trade Marks Registration Act of 1875. There must be one of the following :—(i) the name of a company, individual or firm represented in a special or particular manner ; (ii) the signature of the applicant for registration, or some predecessor in his business ; (iii) an invented word or invented words ; (iv) a word or words having no direct reference to the character or quality of the goods and not being according to its ordinary signification a geographical name or a surname. Now these particulars have been indicated as the result of various cases in which the question as to the nature of trade-marks capable of registration was hotly contested and discussed, and either registration was refused or the trade-mark already registered had to be taken off the register on the ground that it was not capable of registration. The important question that arises may be put in the form of a conundrum: ‘when is a trade-mark not a trade-mark?’ In other words, under what circumstances is an alleged trade-mark invalid in the eye of the law? What are the conditions that affect the right to sue on a trade-mark?

An instance of a registered owner of a trade-mark failing in his attempt to attack a firm for alleged colourable imitation of his trade-mark, on the ground of invalidity, is furnished by the case of *Richard v. Butcher*.¹ In 1882 Heidsick & Co., a French firm of champagne growers registered, under the Trade Marks Registration Act 1875, the words ‘Monopole’ and ‘Dry Monopole’ as separate trade-marks for separate kinds of champagne on the ground of user of those marks before the Act; but they never had, in fact, used those words alone as marks; for upon the labels, wrappers, corks and cases for their bottles, they had

¹ (1891) 2 Ch. 522; 8 R.P.C. 249.

always used them in conjunction with the name of the firm 'Heidsick & Co.' which they also registered by itself in 1882 as a trade-mark under the Act; and upon the corks and cases there were also various devices which had been registered as trade-marks under the Act. The defendants in the action moved to rectify the Register of trade-marks by expunging therefrom the words 'Monopole' and 'Dry Monopole' on the ground that they had never been used alone as trade-marks and were not "special and distinctive" words within the meaning of the Act of 1875. It was held on the above facts that the words 'Monopole' and 'Dry Monopole' had not been used as trade-marks within the meaning of section 10 of the Act of 1875. As Kay, J., observed: "There had not been upon the wrapper or upon the box such a use of the word, 'Monopole' or the words 'Dry Monopole' that a person who bought would believe either to be the trade-mark and the only trade-mark of the man using it."¹

*In re Spencer's
Trade-marks.*

*Spencer's case*² which was referred to by Mr. Justice Kay in the above judgment throws further light on the subject. Spencer's firm had carried on the business of a steel and file manufacturer. They had a mark consisting of a crescent, Z turned on one side, and a diamond, which used to be stamped on all the steel and files of the best quality manufactured by them with the words 'Diamond cast steel' and the words 'Spencer, Rotherham.' The court held that there was no separate user of the words 'Diamond cast steel' as a trade-mark. On appeal the judgment was upheld on the ground that the words "Diamond cast steel" were not used by themselves as a trade-mark but only in conjunction with something else which, with the words in question, made up and composed the trade-mark.

A "special and distinctive word" used in the definition of a trade-mark in section 10 of the Trade Marks Registration Act, 1875, means a word which distinguishes the goods to which it is attached as goods made or sold by the owner of the mark; and by using some additional words so as to induce the

¹ (1891) 2 Ch. at p. 540.

² *In re Spencer's Trade-Marks* 3 Rep. Pat. Cas. 73; 54 L.T.N.S. 659.

general public, as distinguished from persons in the secrets of the particular trade who would not be deceived, to believe that goods so marked are of foreign brand or manufacture the inventor of the original word is precluded from saying that such word is distinctive of his own manufacture so as to be capable of registration as his trade-mark. Where *A* in 1876 registered as his trade-mark the word 'Eton' which had been used since 1869 and become known in the trade as denoting cigarettes of his manufacture and where it was found that he had also been in the habit of selling and supplying for the purposes of sale 'Eton' cigarettes in boxes so labelled as to imply that such cigarettes were manufactured at St. Petersburg by a Russian firm, it was held that *A* by so acting in connection with the word 'Eton' as to suggest to persons not in the trade that the cigarettes were not of his making, had destroyed the value of the word as "special and distinctive" within the meaning of section 10 of the Trade Marks Act, 1875.¹

A ground on which a trade-mark may be declared invalid is that at the time of its registration it was common to the trade in the goods in respect of which it was registered. Soon after the passing of the Trade Marks Registration Act 1875, the point came up for discussion in the case of *In re Hyde & Co.'s Trade Mark*.² Messrs. Hyde & Co., had registered the words 'Bank of England' for sealing wax. Several other makers of sealing wax used the same words, whereupon they were threatened by the registered owners. It was, however, proved that the words 'Bank of England' had been used by a great number of manufacturers of sealing wax. It was held that the trade-mark must be ordered to be removed from the Register. The case of *Newman and Pinto* illustrates some of the above points. The plaintiffs who were manufacturers of and dealers in cigars in England, imported from Germany cigars made of Havana tobacco. There was no direct evidence as to the place where they were manufactured, but the court found as a fact that they were also manufac-

¹ *Wood v. Lambert and Butler* (1886) 32 Ch. D. 247.

² (1878) 7 Ch. D. 724. ^d 57 L.T.N. 531.

tured in Germany. Plaintiffs sold these cigars in England in boxes on which was a label containing their trade-mark (registered under the Trade Marks Registration Act, 1875) which consisted of the words 'La Pureza,' and a pictorial representation of an Indian woman holding up a bundle of cigars, two winged boys each holding a shield, and a back ground representing a portion of some tropical country. On one shield was depicted the arms of Spain, and on the other those of Havanah. In the trade-mark as registered the shields were blank. A smaller label contained what was apparently the lithographed signature of 'Ramon Romnedo.' On each box were branded the words 'La Pureza' and 'Habana.' The defendants having sold cigars in boxes containing similar labels and marks, the plaintiffs commenced an action for an injunction, account of profits, etc. The defendant contended that the plaintiff was not entitled to relief, because firstly, the plaintiff was guilty of misrepresentation having used the word 'Habana' in such a manner as to lead people to think that the cigars were made of Havanah tobacco whereas they were admittedly not made in Havanah and secondly, that the plaintiff was not using his trade-mark as registered. The plaintiff proved that in a great number of instances the word 'Habana' was used upon cigars not made in Havannah and urged that the word 'Habana' had come to denote shape. Kekewich, J., granted the injunction prayed for. On appeal Mr. Justice Kekewich's judgment was reversed and it was held that as the trade-mark and other marks on the plaintiffs' boxes together amounted to a dressing up of the plaintiffs' cigar and a misrepresentation that they were cigars manufactured in Havannah the action must be dismissed. Lord Justice Bowen in referring to the word 'Habana' observed that he did not attach much importance to it, because the word 'Habana' had in the tobacco trade ceased to be a term which meant anything in particular except that the cigar was made in the shape and way in which the old Havana cigars used to be made. As to Ramon Romnedo he observed that it was "a name intended to appear to the English purchasing public as a Spanish name. Following the

name of a Spanish brand and 'Habana' it seems to me it is intended, I will not say to state, but to suggest to the purchaser, that 'Ramon Romnedo' is an existing person, or was an existing person, who has something to do with Havana, and with an Havana brand; and secondly, that he has something to do with the cigars inside this box.... It surely represents that in the manufacture of the cigars some Havana house is concerned, somebody who is entitled to use the name or the facsimile of the signature 'Ramon Romnedo.' Well, that is absolutely false. This box is made in Germany. The whole of these pictures are devised in Germany; the signature 'Ramon Romnedo' who is a person that never existed, is put on in Germany; and the whole thing is a simple sham.... I think that no court of justice can assist a man who is engaged in that operation."¹

Next take the case of *Cheavin v. Walker*² which also illustrates the above principles. In this case a patent for improvements in filters was taken out in 1862 by S. Cheavin in the name of himself and of his son G. Cheavin. After the death of S. Cheavin the business was carried on by his son who made and sold filters under the title, and marked with a label thus "S. C.'s Improved Patent Gold Medal Self-cleaning Rapid Water Filters." The patent of 1862 was allowed to lapse in 1865. In 1867, G. Cheavin altered his label to "G. C.'s Improved Patent Gold Medal Self-cleaning Rapid Water Filters" above which was a medallion containing the royal arms, surmounted by the words "By Her Majesty's Royal Letters Patent." The defendants who had been in G. Cheavin's employ set up in business in the same town in 1876 as makers and sellers of filters, which were similar in appearance to those of G. Cheavin's and inscribed thus—"S. C.'s Patent Prize Medal Self-cleaning Rapid Water Filters, Improved and Manufactured by W. & Co." The plaintiff claimed an injunction. It was held by the Court of Appeal that the label used by the plaintiff was not a trade-mark but only a description of the article as made according to S. Cheavin's patent which was common to all the public; secondly, that there

¹ Ibid., at p. 37.

² (1877) 5 Ch. D. 850.

was nothing in defendants' label calculated to mislead the public by a fraudulent imitation of the plaintiffs' label; thirdly, that the plaintiffs' label coupled with the medallion of the Royal Arms, constituted a false representation that the patent was still subsisting and disentitled the plaintiff to relief by injunction.

Millington v. Fox.

It has been observed above that it is necessary that the mark should be distinctive and not merely descriptive. This question arose in *Millington v. Fox*, one of the earliest of the cases.¹ There the plaintiffs sued for infringement of their trade-marks by the defendants, the trade-marks consisting, among others, of the words 'Crowby Millington' or one of them. The defendants alleged that both Crowby and Millington were technical terms which had a recognised signification in the market, viz. steel shaped in a particular way, in other words, that they were descriptive, not distinctive of the plaintiff's goods. But the most important class of cases in which the question has arisen is that in which it is argued that a name or mark, which may have been 'distinctive' to begin with, loses its distinctive character under particular circumstances and becomes *publici juris*, or open to all members of the community. It may be that under the leave and license of the owner of the mark it has been used by others, or that by reason of neglect in asserting his right other people have used the mark along with him, or that by mere lapse of time the mark has come to have a secondary signification which is descriptive of the particular class of goods upon which it is placed, rather than indicative of their source or origin, or that owing to other circumstances it has become the common property of the public and is no longer the exclusive proprietary right of an individual trader. Thus 'Harvey's Sauce' became *publici juris* because the owners of the name did not take proper precautions to protect their right. Lord Justice Mellish thus commented upon it in the case of *Ford v. Foster*.² "There is no doubt, I think, that a word which was originally a trade-mark, to the exclusive use of which a particular person, or his successor, in trade, may have been entitled, may subse-

A 'distinctive' mark may cease to be distinctive and *publici juris*.

¹ (1838) 3 My. and Cr. 338.

² L.R. 7 Ch. 611.

quently become *publici juris*, as in the case which has been cited of 'Harvey's Sauce' It was admitted there that although that had been originally the name of the sauce made by a particular individual, it has become *public juris*, and that all the world were entitled to call sauce 'Harvey's Sauce' if they pleased." If, however, the owner of the name jealously protects his right by taking prompt steps against any attempts at infringement as happened in the case of *Powell v. Birmingham Vinegar Brewery Co.*¹ the name in question may be successfully prevented from becoming *publici juris*. The plaintiffs in that case, had been making and selling a sauce to which they gave the name of 'Yorkshire Relish' and upon the bottles was affixed a label in red, white and blue. The evidence showed that the defendant had placed before his designer the bottle and the label with instructions to copy it as closely as possible and that the designer had succeeded in making a copy such as would be likely to deceive purchasers. Mr. Justice Kay held that it was a gross fraud and that it was calculated and meant to deceive. Referring to the question as to whether the words 'Yorkshire Relish' had become *publici juris*, he observed: "Then there remained the question what the defendant had thought fit to contest, namely, whether or not he might use the words 'Yorkshire Relish' and the mode in which he attempted to justify doing that was this. He did not say he was aware of the materials, or mode of manufacture of the plaintiff's sauce, or that the words 'Yorkshire Relish' had become the exclusive designation of a particular sauce that might be made by anybody, but he said other people had been making sauces to which they had given the name 'Yorkshire Relish.' From the evidence it appeared that if this were so, it had been done in a secret and hole-and-corner sort of way and to such a small extent, that it did not become known to the principal dealers in such goods. The defendant had no manufactory in Yorkshire; he had no knowledge of the recipe of the plaintiffs; and he could not justify the use of the title 'Yorkshire Relish' by saying that other people had used the

Powell v. Birmingham Vinegar Brewery Co.

¹ (1896) L.R. 2 Ch. 54; on appeal 1897 A.C. 710.

The Sewing Machine cases.

name." An injunction was granted on these grounds restraining the use of the words 'Yorkshire Relish' and the use of the label.

The principle of a trade name becoming *publici juris* is well illustrated by the Sewing Machine Cases. The earliest of these was that of the Wheeler and Wilson Sewing Machine Company.¹ In that case the plaintiffs were an American Company, of which Messrs. Wheeler and Wilson, two of the original members of the company, possessed the patent right to manufacture a particular type of sewing machines on an improved principle. The patent expired in the year 1866. In 1867, the defendant began to sell machines other than the plaintiffs', under the title of "Wheeler and Wilson's Sewing Machines" and representing himself as agent for the sale of Wheeler and Wilson sewing machines. In an action for injunction by the plaintiffs it was held by James, V. C., that the name 'Wheeler and Wilson' affixed to a sewing machine was not distinctive of the plaintiffs' manufacture but was only descriptive of the particular type of machinery. "It seems to me that the name 'Wheeler and Wilson Machine' has come to signify the thing manufactured according to the principle of that patent. That being so, I cannot restrain anybody, after the expiration of that patent, from representing his article as being the article so patented. A man cannot prolong his monopoly by saying 'I have got a trade-mark in the name of a thing which was the subject of a patent' and, therefore, to that extent, I think the plaintiffs are not entitled to the relief they ask."²

A similar principle was laid down in the case of *Singer Manufacturing Co. v. Wilson*³ and of *Singer Manufacturing Co. v. Loog*.⁴ In both these cases it was laid down that a manufacturing company who affixed their own device and their own name to their machines were not precluded from using the name 'Singer' as descriptive of the principle on which the machines were constructed. There is, however, one

¹ 39 L. J. Ch. 36.

² *Ibid*, at p. 40.

³ 2 Ch.D. 434, 443, 3 A.C. 376; 45 L. J. Ch. 490, 47 L. J. Ch. 481; 34 L. T. (N.S.) 858. ⁴ 38 L. T. (N.S.) 303, 24 W.R. 1023; 26 W.R. 664.

⁵ 18 Ch.D. 395, 412, 8 A.C. 15; 52 L. J. Ch. 481; 44 L. T. (N.S.) 888; 48 L. T. 3.

important proviso, viz. that there must be no attempt to represent that the machines were manufactured by the original manufacturer, nor must there be an appropriation of the special or distinctive device of the original manufacturers, so as to lead to deception.

The Linoleum Case¹ is perhaps the most instructive case on this branch of the subject and it also illustrates the respective functions of a trade-mark and a trade-name. *The Linoleum Co v. Nairn* A Mr. Walton had obtained a patent in 1863 for preparing floor-cloth by means of a certain solidified or oxydised oil, to which he gave the name 'Linoleum,' and the floor-cloth made by him therewith had been called Linoleum Floor Cloth and apparently also Linoleum. The word Linoleum had not been previously used and was a fancy name invented by Mr. Walton, and the substance itself appeared to have been new. In 1864 the Linoleum Manufacturing Co., the plaintiffs in this action, was formed and took assignments of Mr. Walton's patents and rights. The patent of 1863 had now expired. The defendants who were floor-cloth manufacturers proposed to make and sell Linoleum Floor Cloth, calling it by that name. The plaintiffs thereupon brought a suit for restraining them. The plaintiffs had a trade-mark which used to be stamped upon the floor-cloth with the words 'Linoleum Floor Cloth' written along side it and the words 'F. Walton's Patent' also written conspicuously on the article. The case of the plaintiffs was that the essential, or one of the essential and material terms of their trade-mark was the word 'Linoleum' and that this had been taken by the defendants. The defendant's trade-mark contained their own name much more conspicuously than the word Linoleum and was quite dissimilar from the plaintiff's trade-mark. They contended that the word Linoleum was merely descriptive of the article and was not an essential part of the trade-mark. Fry, L.J., held that the words 'F. Walton's patent' was the most conspicuous part of the trade-mark used by the plaintiffs and that the word Linoleum appeared to be used in a descriptive sense. "The word directly or primarily means solidified oil. It only secondarily means the manufacture

¹ *The Linoleum Co. v. Nairn*, 7 Ch. D. 834; 47 L.J. Ch. (1878) 430

of the plaintiffs and has that meaning only so long as the plaintiffs are the sole manufacturers. In my opinion, it would be extremely difficult for a person who had been by right of some monopoly the sole manufacturer of a new article, and has given a new name to the new article meaning that new article and nothing more, to claim that the name is to be attributed to his manufacture alone after his competitors are at liberty to make the same article.”¹

It must not be supposed that because a name which was formerly applied to a patented article has, on the expiration of the patent, become public property and has come to designate a particular class or character of goods, any man is at liberty to use the label by which the patentees were accustomed to distinguish their goods. That would be taking the rule as to a name becoming *publici juris* too far. The limits within which the rule is to be applied were indicated by Wood, V.C., afterwards Lord Hatherley, thus: “It was said that when a patent expired, it was open to the public at large to adopt the description of the article by which it had become known to the world, and to use the label by which the article made by the plaintiffs had been theretofore distinguished. It does not, however, follow because upon the expiration of the patent the article and known description became open to all, that, therefore, all would be entitled to use the label by which the patentees had been accustomed to distinguish their goods. The public may have acquired confidence in that particular label, and that confidence may have given a value to it, which the patentees may be entitled to have protected after the expiration of the patent.”

*Wotherspoon v.
Currie.*

The cases discussed above illustrate the principle not only of infringement of trade-mark, but also in many instances the principle of passing off. Cases can easily be multiplied. But it is necessary to add only a few more of the leading cases which are luminous on special points. The case of *Wotherspoon v. Currie* is one of them. Messrs. Fulton & Co., had formerly carried on the business of starch makers at Glenfield

¹ L.R. 7 Ch. 834 at p. 837. See also *Braham v. Bustard* 1 H. and M. 447 cited at p. 338.

near Paisley. They manufactured a species of powder starch from sago and gave it the name of 'Glenfield Double Refined Powder Starch' by which name it became well known to the public. One William Wotherspoon purchased the business from Messrs. Fulton & Co., and with the business the plant and stock at Glenfield. For some years Wotherspoon carried on the business of making starch at Glenfield itself, but subsequently the works were removed to another and more commodious place in Maxwell town, as also near Paisley which became known as the 'Glenfield Starch Work,' the article itself being commonly known as Glenfield starch. Currie was a starch and corn-flour manufacturer. His place of residence had been for many years at Glenfield during the whole of the time that the starch works of Fulton, and afterwards of Wotherspoon, had been carried on there. Currie had a brother in the business, and finding that there was a considerable sale of starch under the name of 'Glenfield Starch' conceived the idea of becoming a starch manufacturer and applied to Fulton to let him occupy a small portion of the building at Glenfield. Thus Currie succeeded in setting up his manufactory at Glenfield. He sold his starch in packets bearing the name 'Royal Palace Starch' and also the name of 'Currie' but also in very distinguishing and emphasised character the word 'Glenfield.' The plaintiffs contended that the only object of the defendant was to give colour to the use of the word 'Glenfield' on the defendant's labels. On the other hand, it was contended by the defendant that no person can acquire a monopoly in the name of a place so as to prevent any other person carrying on his business at that place, as in the present case, from putting the name of the place on the articles produced there. Malins, V.C., granted the injunction prayed for. On appeal James, L.J., dissolved the injunction. The plaintiff appealed to the House of Lords, which reinstated the judgment of Malins, V.C. Lord Hatherley observed: "The name of the article if it has acquired a name, should not, by any honest manufacturer, be put upon his goods if a previous manufacturer has, by applying it to his goods, acquired the sole use of that name. I mean the use in this sense, that his

goods have acquired by that description a name in the market, so that whenever that designation is used he is understood to be the maker, where people know who the maker is at all or if people have been pleased with an article, it should be recognised at once by the designation of the article, although the customers may not know the name of the manufacturer. It may very well be that hundreds of people like Glenfield starch and order it because they think that it is the best starch that they ever used, without having heard the name of Mr. Wotherspoon and without knowing him at all. They say, I want the thing that bears the name, the thing made in a particular way, made by the manufacturer who makes it in that way, and there being only one manufacturer who does make it in that way, I want the article made by that manufacturer. That being so, it appears to me that the respondent, if he was an honest manufacturer setting up in business, would take great care and all the more because he was setting up in business at a place where Glenfield starch had been manufactured and sold, to disconnect his name with any name which had become exclusively a designation of an article manufactured by the appellants.”¹ In other words the court held that the word ‘Glenfield’ had acquired a secondary signification in connection with a particular manufacturer—it had become the trade designation of the starch made by the plaintiff.

Ford v Foster.

In *Ford v. Foster*² the plaintiff had brought out a shirt of a particular shape which he had called ‘The Eureka’ and which obtained a wide reputation in the market. He always marked his shirt with the following mark ‘R. Ford’s Eureka Shirt, London’ and described his shirt in all advertisements and elsewhere as ‘Ford’s Eureka Shirts.’ The defendants marked their shirts with the words ‘The Eureka Shirt’ and advertised themselves as manufacturing and selling ‘Eureka Shirt.’ It was contended by the defendants that the two descriptions being different there could be no deception or likelihood of confusion. But on appeal it was held that the word ‘Eureka’ was the

¹ 5 H.L. 508 at pp. 514, 515.

² (1827) L.R. 7 Ch. 611; 41 L.J. Ch. 682.

leading description and in purchasing the shirt the public would be guided by it rather than the name 'Ford' to which it is attached. "It is quite obvious," said Mellish L.J., "that although he puts the word 'Ford' to it for the purpose of enabling people to come to him and to tell them, when you buy a Eureka shirt you must buy it of Ford, yet a large number of persons who read these advertisements would be attracted by, and remember, the word 'Eureka' and would wholly forget the word 'Ford.'"¹ In the case of *Orr-Ewing & Co. v. Johnston & Co.*,² the plaintiffs had used upon their Turkey red yarn a ticket containing among other things a representation of two golden elephants and a golden banner which, they claimed, had been known ever since its introduction as the 'Elephant Ticket' or 'Two Elephant Ticket.' They also claimed that the yarn to which it was affixed had become widely known, especially in the Indian and African markets, as 'Elephant Yarn' and had acquired a great reputation under that name. The defendants used a ticket upon their Turkey red yarn which was of a similar shape and colour to the plaintiffs' two-elephant ticket and it also had two golden elephants and a golden banner. It was alleged that the defendants' ticket was calculated to deceive purchasers into the belief that their goods were those of the plaintiffs'. The plaintiffs claimed an injunction and other consequential reliefs. It was held that the two elephants were a material and substantial part of the plaintiffs' ticket. "If one man will appropriate to himself a material and substantial part of the ticket which another man has used for the purpose of indicating his goods, he ought so to appropriate it, and with such precautions, as that the reasonable probability of error should be avoided."³ On the ground that such probability of error was not avoided the court granted the injunction asked for. *Barlow v. Johnson*⁴

Orr-Ewing & Co. v. Johnston & Co.

Barlow v. Johnson

¹ 41 L.J. Ch. at p. 689; (1872) L.R. 7 Ch. at p. 629.

² L.R. 13 Ch. D. 434.

³ *Ibid.*, at p. 448.

⁴ (1890) W.N. 110.

a particular kind of Turkish towel and put upon it a label or ticket which, among other things, contained the word 'Osman' in a conspicuous place. The towels acquired in course of time a great reputation in the market. The defendants, a rival firm, began to turn out a similar kind of Turkish towel and to use upon it a ticket not entirely similar to the plaintiffs but bearing in a prominent position the word 'Osman.' An injunction was issued restraining the defendants from using the word 'Osman' on the ground that it was the essential feature of the label and its use by another was calculated to cause deception or confusion. What constitutes a colourable imitation is laid down by Lord Langdale in the following famous dictum of his in *Croft v. Day*.¹ "First, there must be such a general resemblance of the forms, words, symbols, and accompaniments as to mislead the public; and, secondly, a sufficient distinctive individualism must be presented, so as to procure for the person the benefit of that deception which the general resemblance was calculated to produce. To have a copy of the thing would not do, for, though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, an imitation of which was improperly sought to be sold. For the accomplishment of such a fraud, it was necessary in the first instance to mislead the public; and in the next place to secure a benefit to the party practising the deception by preserving his own individuality."

Croft v. Day.

Seixo v. Provezende.

Again, Lord Cranworth in *Seixo v. Provezende*² lays down the rule in the following terms: "It is hardly necessary to say that, in order to entitle a party to relief, it is by no means necessary that there should be absolute identity; what degree of resemblance is necessary is, from the nature of the thing, a matter incapable of definition *a priori*. All that courts of justice can do is to say that no trader can adopt a trade-mark so resembling that of a rival as that ordinary purchasers, with ordinary caution, are likely to be misled. It would be a mistake, however, to

¹ 7 Beav. 84.

² (1866) L.R. 1 Ch. 192; 14 L.T. (N.S.) 314; 14 W.R. 357; 12 Jur. (N.S.) 215.

suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use. If a purchaser looking at the article offered to him, would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the court considers the use of such a mark to be fraudulent. But I go further: I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as the actual copy of his device."

A few words are necessary on the question of Assignment of Trade-Marks assignment of trade-marks. Under Section 22 of the Trade Marks Act, 1905 (5 Ed. VII, C. 15), a trade-mark when registered can be assigned and transmitted only in connection with the goodwill of the business concerned in the goods for which it has been registered and shall be determinable with that good will. It appears that this statutory provision is only confirmatory of the common law.¹ This view has also been taken by the Judicial Committee in the case of *J. Ulman & Co. v. Cesar Luba*.²

The remedies in an action for infringement are Remedies. of three kinds, first, an injunction restraining further infringement; secondly, delivery up for destruction to the plaintiff of any goods already marked with the spurious mark which may be in the possession or control of the defendant, or erasure of the marks; thirdly, damages for the infringement, or, in the alternative, an account of the profits made by the defendant by the sale of goods bearing the

¹ See *Hall v. Barrows* (1863) 4 De G. J. and S. 150 at 158 s.c. 46 Eng. Rep. 873. *Hannah v. Juggernath & Co.* (1914) I.L.R. 42 Cal. 262; 19 C.W.N. 1.

² (1908) 13 C.W.N. 82 P.C. See also *West End Watch Co. v. Berna Watch Co.* 13 Bom. L.R. 212; 10 I.C. 805 where it was laid down that there can be no property in a trade-mark in gross apart from goods of which it has become the symbol.

offending mark. Some one or more of these remedies may meet with the requirements of the case.

In order to found the jurisdiction of the court three things must be established ; first, the existence of a trade-mark ; next, the fact of an imitation, whether a direct imitation or one with such variations that the court must regard them as merely colourable, and thirdly, the fact that the imitations were made without licence or anything that the court would regard as acquiescence in their use.¹

Injunction.

It is obvious that the most beneficial remedy for the plaintiff is an injunction because it summarily stops the infringement. The general rules regarding injunction apply to trade mark cases. Thus an injunction may be granted even if there is no actual infringement, provided it is proved that the defendant contemplates committing an infringement or has threatened to commit one.² Possession of a considerable quantity of goods bearing the pirated trade-mark, even as a forwarding agent⁴ will be sufficient evidence of intention to infringe. And an injunction may be granted notwithstanding a promise by the defendant to commit no further infringement,⁵ or though the defendant has discontinued the use of the infringing trade-mark,⁶ and has undertaken not to use any of the infringing labels,⁷ or even when he has actually retired from the business in which the pirated marks were used.⁸ In some cases, however, the undertaking of an innocent infringer has been accepted.⁹ The infringement need

¹ *Kinahan v. Bolton* 15 Ir. Ch. 75; *Singer Manufacturing Co. v. Loog* 18 Ch. D. 395.

² *The Emperor of Austria v. Day and Kossouth* 3 De G. F. and J. 217 ; 30 L.J. Ch. 690 (1861). "The very life of a trade-mark depends upon the promptitude with which it is vindicated." *Johnston v. Orr-Ewing* 7 A.C. 219.

³ *Upmann v. Forester* (1883) 24 Ch. D. 231. "The infringement of a patent and of a trade-mark may be treated on the same footing, the question being one and the same, namely, whether the right of exclusive user has been infringed." *Per Chitty, J.*, *Ibid.*, at p 234, citing *Adair v. Young* (12 Ch. D. 13) and *Neilson v. Betts* (L.R. 5 H.L.).

⁴ *Upmann v. Elkan* L.R. (1871) 12 Eq. 140; L.R. 7 Ch. A.C. 130.

⁵ *Geary v. Norton* (1846) 1 De G. and Sm. 9 s.c. 63 Eng. Rep. 949; *Burgess v. Hills* (1885) 26 Beav. 244 s.c. 53 Eng. Rep. 891; *Tonge v. Ward* 21 L.T.N.S. 480; *Abdul Salam v. Hamidulla* 15 I.C. 116.

⁶ *Guinness v. Heap*, Sebastian's Digest of Trade Mark cases, p. 617.

⁷ *American Tobacco Co. v. Guest* (1892) 1 Ch. 630.

⁸ *Weed v. Peterson* 12 Abb. Pr. N.S. 178.

⁹ *Upmann v. Forester* (1883) 24 Ch. D. 231. But the court made the defendant liable for all the costs. "As there is no fund out of which

not be fraudulent,¹ and an injunction will be granted even if it was made in ignorance of the plaintiff's right.² The injunction may be couched in general terms so as to comprehend all the phases and features of the mark in question and to prohibit the use of it in any shape or form whatsoever; or it may be more limited in its operation,—not disallowing the use of the mark altogether but laying down conditions and safeguards as to the manner of using it or as to the matter of it.³ It may also be limited with reference to the use of the mark in a particular country or market.⁴

It is usual for the plaintiff to apply for an inter-locutory injunction at an early period. This application must be made speedily⁵ as delay would lead the court to infer that the case is not of an urgent nature.⁶ In such cases the court is principally guided by the balance of convenience. Where the intervention of the court is sought on interlocutory applications there is always a danger of prejudging on imperfect and incomplete materials questions which must be finally determined at the hearing of the case. Unless therefore an overwhelming *prima facie* case is made out that irreparable injury may be suffered by the party without an injunction, the court will not usually intervene. Failing to make out a strong *prima facie* case, the plaintiffs remedy is to apply for expedition of the suit.⁷

Interlocutory
Injunction

The second remedy is applicable to cases where

successful plaintiffs can receive costs, their costs must be paid by the defendants, although they may be innocent." *Per Chitty, J. Ibid.*, at p. 237.

¹ *Mullington v. Fox* (1838) 3 My. and Cr. 338 s.c. 40 Eng. Rep. 956.

² *Moet v. Custon* (1864) 33 Beav. 578 s.c. 55 Eng. Rep. 493; *Edelsten v. Edelsten* (1863) 1 De G.J. and S. 185; s.c. 46 Eng. Rep. 72; *Orr-Ewing & Co. v. Grant Smith & Co.* 2 Hyde 185; *Cartier v. Carlisle* 31 Beav. 292 s.c. 54 Eng. Rep. 1151; *Upmann v. Forester* 24 Ch. D. 231. But an account of profits or compensation will not be given (see *infra*).

³ *Ford v. Foster* L.R. 7 Ch. A.C. 611; *Siebert v. Findlater* 7 Ch. D. 801; *Braham v. Beachim* 7 Ch. D. 848; *Massam v. Thorley's Catile Food Co.* 14 Ch. D. 748; *Orr-Ewing v. Johnston* 7 A.C. 219; *Reddaway v. Banham* (1896) A.C. 199.

⁴ *Carver v. Bowkirk* Dig. 581; *Barker v. Manico* 10 P.R. 93; *Orr-Ewing v. Johnston & Co.* 13 Ch. D. 434 at 464 s.c. 7 Ap. C. 219, 227. *In re Paine* (1893) 2 Ch. 567; *In re Societe Anonyme Des Verreries de l'Etoile* (1894) 1 Ch. 61.

⁵ *Chubb v. Griffiths* 35 Beav. 127.

⁶ *Isaacson v. Mampson* 41 L.J. Ch. 101.

⁷ *F. Reddaway & Co. v. Schroder Smidt & Co.* (1903) 8 C.W.N.

Delivery up or
erasure.

the defendant has spuriously marked articles in his possession or under his control. In such cases the court orders the erasure of the marks or the delivery up of the marked articles for that purpose¹ or, if erasure is impracticable, for destruction. Destruction will not be ordered if it is possible to satisfactorily erase the spurious marks.² Sometimes only the spurious labels, cards or tickets will be ordered to be delivered up and destroyed.³

Account of profits.

The liability to account for profits is usually incidental to the injunction.⁴ The plaintiff, however, may, at his option, have an enquiry as to damages in lieu of the account, but not both.⁵ Mere proof of infringement entitles the plaintiffs to nominal damages,⁶ and no allegation of special damage is necessary.⁷ But where the plaintiff claims substantial damages he must establish the extent of the damage done.⁸ It will not be assumed that the amount of goods sold by the defendant under the infringing trade-mark would have been sold by the plaintiff but for the defendant's unlawful competition.⁹ Generally speaking the injury done is that the sale of the plaintiff's goods is in some degree diminished¹⁰ on account of the sale of the defendant's goods, but there may be further damage under exceptional circumstances, e.g. where the plaintiff's trade reputation has been injured on account of the inferiority of the infringing goods, or where the plaintiff has been compelled to lower his prices on account of the unlawful competition of the defendant.¹¹ But neither

¹ *Dent v. Turpin* 2 J. and H. 139; *Upmann v. Elkan* L.R. 12 Eq. 140 s.c. 7 Ch. 130.

² *Slazenger v. Feltham* (1889) 5 T.L.R. 265 s.c. 6 R.P.C. 531.

³ *Farina v. Silverlock* 1 K. and J. 509; 9 De G.M. and G. 214; 4 K. and J. 650; *Edelsten v. Edelsten* 1 De. 4 J. and S. 185 s.c. 46 Eng. Rep. 72.

⁴ *Cartier v. Carlile* 31 Beav. 292; see *Edelsten v. Edelsten* 1 De. G.J. and S. 185; *Saxlehner v. Apollinaris Co.* (1897) 1 Ch. 893.

⁵ *Lever v. Goodwin* 36 Ch. D. 1; *Neilson v. Betts* (1871) L.R. 5 H.L. 1; *De vitre v. Betts* (1872) L.R. 6 H.L. 319.

⁶ *Blofeld v. Payne* (1833) 4 B. and Ad. 410.

⁷ *Rodgers v. Nowill* (1847) 5 C.B. 109 s.c. 17 L.J.C.B. 52; *Reddaway v. Benthams Hemp Spinning Co.* (1892) 2 Q.B. 639; *Dixon v. Fawcus* (1861) 3 E. and E. 537; 30 L.J.Q.B. 137; *Abdul Salam v. Hamidullah* 15 I.C. 116.

⁸ *Davenport v. Rylands* L.R. 1 Eq. 308, *per* Wood, V.C.

⁹ *Leather Cloth Co. v. Hirschfield* (1885) L.R. 1 Eq. 299.

¹⁰ *Morison v. Salmon* 2 Man. and G. 385; 2 Scott N.R. 449; *Chappell v. Davidson* 2 K. and J. 123; *Singer Manufacturing Co. v. Wilson* 2 Ch. D. 434, 442, 451, 454; *Reddaway v. Benthams Hemp Spinning Co.* (1892) 2 Q.B. 639; *Taylor v. Carpenter* 2 Wood and M. 1.

¹¹ *Cf. Alexander v. Henry* (1895) 12 R.P.C. 360. See also *Manockji Petit*

an account nor an enquiry as to damages will be ordered if the evidence of the sale of the spuriously marked articles is insufficient to make out an intention to deceive on the part of the infringer, as for instance in a case where the defendant filled a few bottles bearing the plaintiff's mark with a preparation of his own, having removed from them the plaintiff's label and placed upon each of them his own label' and under circumstances which showed that he could not have had any fraudulent intention.

An innocent infringement is no defence to a plaintiff's claim to an injunction; but it appears that the position is different with regard to account of profits or damages. As Lord Chancellor Westbury observes:² "Although it is well founded in reason and also settled by decision, that if *A* has acquired property in a trade-mark, which is afterwards adopted and used by *B* in ignorance of *A*'s right, *A* is entitled to an injunction; yet he is not entitled to any account of profits or compensation, except in respect of any user by *B* after he became aware of the prior ownership." Again, "on authority and principle it is clear that if a man manufactures goods and knowingly marks them with the trade-mark of another person, he is accountable for the profits so made. Thus, if a man brews porter and puts the name and mark of Guinness upon it, knowing he has no right to that mark, and sells his own manufacture as the manufacture of another person, he is liable to account. Even if he did not at first know that there were such persons as Guinness and Company, still, if when he has that knowledge he continues the sale, it makes him accountable to them for the profits obtained by the use of their name. But if a person, who is not a brewer, applies to an agent for Guinness's porter, and that agent sends him a spurious article under that name, such person is in no default until he is told that the porter he is selling is not that of Guinness; and though Guinness is entitled

Innocent
Infringement.

Manufacturing Co. v. Mahalaxmi Spinning and Weaving Co., Ltd. I.L.R. 10 B. 617.

¹ *Rose v. Loftus* (1878) 47 L.J. Ch. 576. In this case Malins, V.C., did not grant an injunction even, but made the defendant give an undertaking that he would not repeat the act (p. 579).

² *Edelsten v. Edelsten* 1 De. G.J. and S. 185 at p. 199 s.c. 46 Eng. Rep. 72.

to an injunction to restrain the future sale of the spurious article, he is not entitled to an account of the profits.”¹ On the above principle it has been held that in all those cases where it is possible to impute to a person imitating a trade-mark a desire to gain the advantages which are attached to the use of that particular trade-mark which is the private property of another person, in other words, where there has been a colourable imitation of a trade-mark “the liability to account for the profits is incident to the injunction, and the fact of the defendant not knowing to whom the trade-mark he copies belongs, does not, in the slightest degree, affect the right of the owner to an injunction and to an account of the profits as soon as he ascertain that it is imitated and used.”² The profits will not necessarily be calculated from the sale of the offending articles to the ultimate purchaser. Thus, where, they have been sold to middlemen and the middlemen find it for their benefit not to use them fraudulently, the profit for which the defendants must account is the profit which they have made by the sale of the articles in a fraudulent dress to the middlemen. The underlying principle is that such conduct on the part of the defendants puts “into the hands of the middlemen the means of committing a fraud on the plaintiffs.”³ An account of profits will not be granted in a case in which the plaintiff after becoming aware of the infringement allows the defendant to continue in the expectation of ultimately obtaining the profits from him;⁴ and mere neglect to take proceedings has also sometimes been visited with the same consequence⁵—unless the delay was in order to collect sufficient evidence to

¹ *Per* Sir John Romilly M.R. in *Moet v. Custon* (1864) 33 Beav. 578 s.c. 55 Eng. Rep. 493.

² *Per* Sir John Romilly M.R. in *Cartier v. Carlisle* (1862) 31 Beav. 292 at p. 298 s.c. 54 Eng. Rep. 1151.

³ *Per* Cotton, L.J., in *Lever v. Goodwin* (1887) 36 Ch. D. 1 at p. 7; followed in *Madhavji Dharamsey Manufacturing Co. Ltd. v. Central India Spinning Weaving and Manufacturing Co., Ltd.* I.L.R. 41 Bom 49.

⁴ *Beard v. Turner* (1865) 13 L.T.N.S. 746 at 749; *Anglo-Swiss Condensed Milk Co. v. Swiss Condensed Milk Co.* (1871) W.N. 163; in the latter case an injunction was granted.

⁵ *Harrison v. Taylor* (1865) 11 Jur. N.S. 408; 12 L.T.N.S. 339, though an injunction was granted. *Md. Jawa Motalla v. H.S. Wilson* (1911) 10 I.C. 787 (a case under S. 15 of the Indian Merchandise Markets Act IV of 1899).

establish the plaintiff's case.¹ In one case² the account was limited to profits earned after the filing of the suit as there was some delay on the plaintiff's part and some misrepresentation in his advertisements and invoices and it was further found that the defendant's trade being larger than the plaintiff's, the extent of the defendant's trade would by no means be a measure of the injury done to the plaintiff's. It appears that in order that the defendant may succeed on the plea of delay he must show not merely that the plaintiffs might have been aware of the infringement but that he "knew of the particular manner in which the defendant was making up his goods and selling them as his own."³

Infringement of a trade-mark is a continuing Limitation wrong and so long as the infringement continues a fresh cause of action arises *de die in diem*.⁴ In the case of a suit for compensation Art. 40, sch. I of the Indian Limitation Act (IX of 1908) applies. A suit for an account of profits is in effect a suit for compensation.⁵ The period of limitation in a suit for an injunction to restrain from the infringement of a trade-mark is governed by Art. 120, Sch. I of the Limitation Act.⁶

The summary remedies for the infringement of Summary Remedies. trade-mark are to be found in the Indian Penal Code (Act XLV of 1860),⁷ and the Indian Merchandise Marks Act (IV of 1889). Sections 480 and 482 of the Indian Penal Code provides that whoever uses a false trade-mark, i.e. marks any goods or any case, package or other receptacle containing goods or uses any case, package, or other receptacle with any mark thereon, in a manner reasonably calculated to cause it to be believed that the goods so marked, or any goods contained in any such receptacle so marked, are the manufacture or merchandise of a person whose manufacture or merchandise they are not—shall be

¹ *Lee v. Haley* (1869) L.R. 5 Ch. 155

² *Ford v. Foster* (1872) L.R. 7 Ch. 633.

³ *Siegert v. Findlater* 26 W.R. 459 at 462. Apparently each case must be governed by its own circumstances; but the above seems to be the legitimate conclusion from the observations of Fry, J., in the case.

⁴ *Abdul Salam v. Hamidula* (1912) 15 I.C. 116.

⁵ *Kimmond v. Jackson* (1877) I.L.R. 3 Cal. 17.

⁶ *Aga Mahmood v. Edward Pelter* 2 L.B.R. 113.

⁷ Sections 478 to 489

punished with either simple or rigorous imprisonment for a term which may extend to one year, or with fine or with both, unless he proves that he acted without intent to defraud. Under section 483 counterfeiting a trade-mark is liable to be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. Making or having in one's possession any die, plate or other instrument for counterfeiting a trade-mark is also an offence (under sec. 485) punishable with imprisonment of either description for a term which may extend to three years, or with fine, or with both. Sec. 486 lays down that whoever sells, or exposes, or has in possession for sale or any purpose of trade or manufacture any goods or things with a counterfeit trade-mark affixed to or impressed upon the same or to or upon any case, package, or other receptacle in which such goods are contained shall be punished with imprisonment of either description for a term which may extend to one year, or with fine or with both, unless he proves (a) that having taken all reasonable precautions against committing an offence under this section, he had at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark, and (b) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the person from whom he obtained such goods or things, or (c) that he otherwise acted innocently. Sections 484 and 487 of the Indian Penal Code deal with kindred offences, relating to false marks.

The Indian Merchandise Marks Act (IV of 1889) deals with false trade descriptions. A trade description, as defined in the act, means any description, statement, or other indication, direct or indirect—(a) as to the number, quality, measure, gauge, or weight of any goods, or (b) as to the place or country in which, or at the time at which, any goods were made or produced, or (c) as to the mode of manufacturing or producing any goods, or (d) as to the material of which any goods are composed, or (e) as to any goods being the subject of an existing patent, privilege or copyright; and the use of any numeral, word, or mark which, according to the custom of the trade,

is commonly taken to be an indication of any of the above matters, shall also be deemed to be a trade description within the meaning of this Act. A false description, according to the Act, means, a trade description which is untrue in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description untrue in a material respect; the fact that a trade description is a trade-mark or part of a trade-mark shall not prevent such trade description being a false trade description within the meaning of the Act. Section 6 of the Act lays down that if a person applies a false trade description to goods, he shall, subject to the provisions of the Act, and unless he proves that he acted without intent to defraud, be punished with imprisonment for a term which may extend to three months, or with fine which may extend to two hundred rupees, and, in the case of a second or subsequent conviction with, imprisonment which may extend to one year, or with fine, or with both. The penalty for selling or exposing, or having in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, as laid down in section 7—is imprisonment for a term which may extend to three months, or with fine which may extend to two hundred rupees, and in case of a second or subsequent conviction with imprisonment which may extend to one year, or with fine, or with both—unless the same ingredients as are mentioned in section 486 of the Indian Penal Code are proved by way of exculpation. The innocent infringer is protected by the provisions of section 8 of the Act. Where a person is accused under section 482 of the Indian Penal Code of using a false trade-mark, by reason of his having affixed mark to any goods or receptacle in the manner mentioned in section 480 or 481 of that Code, as the case may be, or under section 6 of this Act, of applying to goods any false trade description, or under section 485 of the Indian Penal Code of making any die, plate or other instrument for the purpose of counterfeiting a trade-mark and proves (a) that in the ordinary course of his business he

is employed, on behalf of other persons, to apply trade-marks or trade description as the case may be, to make dies, plates, or other instruments for making, or being used in making trade-marks and that, in the case which is the subject of the charge, he was not employed and was not interested in the goods or other thing by way of profit or commission dependent on the sale thereof, and (b) that he took reasonable precautions against committing the offence charged, and (c) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark or description, and (d) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons on whose behalf the mark or description was applied, he shall be acquitted. Section 9 of the Act provides that the court convicting or acquitting a person under any of the above offences may direct the forfeiture to His Majesty of all goods and things by means of, or in relation to, which the offence has been committed or, but for such proof as aforesaid, would have been committed. There is a peculiar provision with respect to piece goods in section 12, which makes it an offence punishable with fine up to one thousand rupees to remove or attempt to remove any piece goods from the premises of a factory without the length of each piece being stamped. Costs of the proceedings may be ordered to be paid (as laid down in section 14) to the defendant by the prosecutor, or to the prosecutor by the defendant, having regard to the information given by, and the conduct of the defendant and prosecutor respectively ; such costs are recoverable as fine.

LECTURE IX.

CONTRACTS IN RESTRAINT OF TRADE.

A contract in restraint of trade is a contract whereby a person binds himself not to follow some particular trade, occupation, calling or profession, or engage in some particular business or enterprise. In the words of Eve, J., it means "a contract whereby a restraint is imposed upon the liberty of an individual to earn his living, or exercise his calling, or in other words a contract whereby the individual liberty of action in trading is interfered with and controlled" ¹. The history of the law relating to contracts in restraint of trade furnishes an unique example of the elasticity of English common law. At the earliest stage we find that the courts set their face against any undertaking on the part of a trader to restrain himself from the exercise of his calling, the principle of the common law being that every one has a right to pursue his own calling without any let or hindrance whatsoever. Gradually, however, the law is changed, till at present we find that the older doctrine has practically been reversed in deference to the changed conditions of society and the requirements of modern commerce. What is particularly striking is that this considerable change has been effected by a process of gradual evolution without any manifest discontinuity and without any extraneous aid from legislation. Sir Frederick Pollock in his treatise on the 'Genius of the Common Law' portrays very vividly the slow but sure change which has come over the common law in regard to monopolies, and in particular, in regard to restraints of trade. I can hardly do better than quote his own words on the subject "When monarchs," says he, "in search of revenue took on themselves to grant monopolies, they found themselves in acute conflict with the people and with the lawyers; and our lady the Common Law showed, not for the first time, that she could and would maintain her ideals even against the King's

¹ *Hepworth Manufacturing Co v. Ryott* L.R. (1920) 1 Ch. D. at p. 33.

authority and whatever learning he could command among his counsellors. But the danger was not exhausted here. Private and local monopolies might be created by agreement, or short of actual monopoly, capable workers might be tempted by the offers of rivals or successors to deprive the public of their services and unduly narrow the field of competition. From these considerations the whole chapter of the law against contracts in restraint of trade was developed. In the earlier decisions, and still more in dicta which have been carelessly quoted in modern books as if they had positive authority, we find an extreme jealousy of all undertakings by which a man purports to restrain himself in any degree from the exercise of his calling. It is not clear that this attitude was always unreasonable. But as time went on the old and merely local conditions disappeared, the volume and scope of trade increased and the range of business relations in space became practically unlimited. At last it was obvious that no man dealing on a large scale could safely acquire the good-will of a business unless he were protected from destructive competition at the hands of the seller himself; without adequate protection of that kind, indeed, there really would be nothing substantial, in many kinds of business, for the seller to offer and he would find no buyers. Hence it became needful to recognize that restrictions which appeared extravagant in the sixteenth or eighteenth century might be no more than reasonable in the nineteenth; and here we may see one of our lady's most remarkable successes. Without any aid of legislation without express disapproval of a single received authority, the law as to agreements in restraint of trade has in our own time effected a change of front that has brought it completely into line with modern business conditions."

The principle on which the rule is based.

Now what is the principle on which the rule against contracts in restraint of trade is based? In the words of a well-known American writer "The general principles on which contracts in restraint of trade have been held to be in contravention of public policy and, in consequence, void, is that it is the duty of the law-making power to secure to every citizen, the right to pursue his ordinary avocation and to dispose

of his labour, or the product thereof, without restraint, and to protect the public from the evil consequences of an agreement under which it would be deprived of the benefits of competition in skilled labour. The law has regard, on the one hand, to the interests of the person restrained from labour or trade, protecting him from oppression or from the consequences of an injudicious bargain, and, on the other hand, it takes account of the interest of the community in providing that it shall not be deprived of the benefit of his business or exposed to the burden of his support, as a result of his lack of employment.”¹

The principle stated above is simple and intelligible. But the application of it is fraught with difficulties, for it is hard to make out in each individual case how far the restriction of a man's right to contract himself out of his business is justifiable and how far such restraint is likely to prove conducive to public weal. An appeal to the doctrines of public policy is too readily made in connection with the law of monopolies in all its branches. In the law relating to restraints of trade it seems to be particularly dangerous in its application. “Contracts creating monopolies,” says Greenhold in his book on Public Policy “are null and void as being contrary to public policy.” This hardly conveys any information, unless public policy can be defined. But public policy is indefinite in its nature and changes with the habits wants and opinions of the society in question. An act which is illegal as being against public policy under the conditions of a given time and country may not be so under the conditions of another. The spirit and temper of the people, the character of its institutions, the conditions of business enterprise and industry, have to be studied

Application of the principle.

¹ Beach's 'Monopolies and Industrial Trusts' 2nd edition, pp. 107-108. A similar enunciation of the principle is given by a learned American author; “The rule of public policy contravening contracts in restraint of trade is based upon two reasons or motives. One is that the performance of such contract, injures the public by depriving it of the restricted party's skill and industry; the other that the restricted party is himself injured because seeking thereby to preclude himself from pursuing his occupation, and thus being prevented from supporting himself and his family, and indirectly threatening the public with becoming burdened with their support. If neither of these evils ensues, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection and may be enforced”.—Spelling's 'Trust and Monopolies,' p. 4.

Public policy uncertain and fluctuating.

with a view to determine what is likely to be against public policy. The standard of public policy must be the standard of the day and what was laid down as to public policy a long time ago may be of little use in settling what is the actual standard at the present day. As Mr. Justice Story observes, "Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and usages of trade, that it is difficult to determine its limit with any degree of exactness. It has never been defined¹ by the courts but has been left loose and free of definition in the same manner as fraud. This rule, may, however, be safely laid down that, wherever any contract conflicts with the morals of the time and contravenes any established interest of society, it is void as being against public policy."²

Reasons for the rule against such contracts.

It is said that although 'public policy' does not admit of a sharply drawn definition, it is something real and tangible. So it is, to be sure. But we get something more definite and intelligible when instead of an appeal to the doctrines of public policy, an attempt is made to analyse the real nature of the harm apprehended by contracts in restraint of trade. In *Alger v. Thatcher*³ the court thus stated the reasons for the rule against such contracts: "Such contracts injure the parties making them, because they diminish their means of procuring livelihood, and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive them of the power to make future acquisitions, and they expose such persons to impositions and oppressions. (2) They tend to deprive the public of the services of men in the employment and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise, and

¹ "Public policy does not admit of definition" *per* Kekewich, J., in *Davies v. Davies* 36 Ch. D. 359, 364 (1907). In *People Ex. Rel. v. Chicago Gas Trust Co.* public policy has been defined as "that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." In the leading case on the subject *Egerton v. Earl Brownlow* (1853) 4 H.L.C. p.196, the classical definition given by Lord Brougham is practically in the same terms "Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good." See also Chapter I, *supra*, p. 16.

² Story on Contracts Art. 675.

³ 10 Pick 51.

diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly and this is especially applicable to wealthy companies and large corporations, which have the means, unless restrained by law, to exclude rivalry, monopolise business, and engross the market. Against evils like these, wise laws protect individuals and the public by declaring all such contracts void."

The earliest case on the subject as appears from the Year Books was heard in the second year of the reign of Henry V (A.D. 1415) and it was there considered to be settled law that contracts in restraint of trade were void as against public policy. This was particularly so in those times in as much as no man under the then existing law could exercise any particular trade without being previously apprenticed and admitted to it, so that if he covenanted not to exercise his own trade he practically covenanted not to exercise any—in other words, not to earn his living.¹ In *Colgate v. Batchelor*² a bond, by a haberdasher conditioned to pay £20 if he used the trade of a haberdasher within a certain place and time was declared to be against law and void, the court observing that "although it were alleged that here he is not prohibited or obliged absolutely that he shall not exercise the trade of an haberdasher, but that if he exercise it, he shall pay to the plaintiff £20, and so it differs from the case of *Hen. v. Pl. 5. b.* yet it was all one; for he ought not to be abridged of his trade and living." In the celebrated Ipswich Tailor's case³ exception was taken to a provision in a bye-law of an association of the tailors on the ground that it was in restraint of trade. The court laid down the principle of common law thus: "No man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil, and specially in young men, who ought in their youth (which is their seed-time) to learn lawful sciences and trades which are profitable to the commonwealth, and whereof they might reap the fruit in their

Under the old law contracts in restraint of trade were void.

¹ Spelling's 'Trusts and Monopolies, p. 5.

² Cro Eliz. 872; s.c. 78 Eng. Rep. 1097. See also *Pragnell v. Gosse Aleyne* 67; s.c. 82 Eng. Rep. 919.

³ 11 Co. 53 a; 1 Rolle Abr. 16; s.c. 77 Eng. Rep. 1218.

old age, for idle in youth, poor in age; and therefore the common law abhors all monopolies, which prohibit any from working in any lawful trade."

Exigencies of a more expanded trade and commerce made the courts revise their views

In the old cases above referred to we find the attitude of the court uniformly was strongly to discourage any and every covenant that might in the least limit the freedom of a subject to exercise his trade or profession as he chose. Thus all agreements, whether general or limited in space and time, would probably have been held bad. But the exigencies of a more expanded trade and commerce made it incumbent upon the courts to revise their views and adopt a more elastic doctrine. This is indicated by Lord Bowen in the following passage: "One reason for the adoption of a more elastic doctrine appears from a judgment delivered in *Broad v. Jollyfe* (1620).¹ In London and other large towns it had become usual already for traders to let their shops and wares to their servants when they were out of their apprenticeship, and for the servants to covenant that they would not use that trade in such a shop or in such a street. The courts, yielding to the progress of industry and commerce finally decided that a man might restrain himself voluntarily and upon valuable consideration from using his trade in a particular place. The onus, however, at this time still lay on the covenantee to show that the covenant on which he was insisting had been made for good consideration, and that it was reasonable."²

Mitchell v. Reynolds.

The case of *Mitchell v. Reynolds*³ represents one of the landmarks in the history and development of this doctrine. The action was in debt upon a bond executed by the defendant which recited that the defendant had assigned to the plaintiff a lease of a messuage and bakehouse in Liquorpond Street, in the parish of St. Andrews, Holborn, London, for the term of five years and that if the defendant should exercise the trade of a baker within the parish during the said term, he should pay to the plaintiff the sum of £50. Parker, C.J., in an elaborate judgment in which he reviewed all the authorities then extant on the subject, held that the restraint was valid. The

¹ Cro. Jac. 596; s.c. 79 Eng. Rep. 509

² (1893) 1 Ch. 630 at p. 655

³ P. Williams 181, s.c. 24 Eng. Rep. 347

basis of the law on the subject as it then existed is to be found in the following passage: "We are all of opinion that, a special consideration being set forth in the condition which shews it was reasonable for the parties to enter into it, the same is good; and that the true distinction of this case is, not between promises and bonds, but between contracts *with* and *without* consideration, and that wherever a sufficient consideration appears to make it a proper and an useful contract and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz. where the restraint is general, not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive." Thus the test laid down for validity of a contract in restraint of trade was its reasonableness, and a contract was to be deemed reasonable or unreasonable according as it was restricted or unrestricted in space. The principle was followed in the case of *Horner v. Graves*.¹ In that case the defendant who was a moderately skilful dentist agreed that he would abstain from practising within a district 200 miles in diameter in consideration of receiving instruction and a salary from the plaintiff, the engagement being terminable at three months' notice. In delivering judgment Tindal, C.J., said: "The greater question is whether this is a reasonable restraint of trade. And we do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive; and, if oppressive, it is in the eye of law unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy."

The test of
reasonableness

In the case of *Hitchcock v. Coker*² the plaintiff

*Hitchcock v.
Coker.*

¹ 7 Bing, 735, 743, s.c. 131 Eng. Rep. 284

² 6 A. and E. 438, s.c. 112 Eng. Rep. 167.

was a druggist and took the defendant into his service as an assistant at an annual salary and the defendant agreed not at any time to engage in the business of chemist and druggist, or either of them in the town of Taunton, or within three miles thereof, and, further, that if he did so he would pay the plaintiff £500 as liquidated damages. Upon breach of this agreement by the defendant the plaintiff brought an action. The Court of King's Bench, upon the authority of *Horner v. Graves*,¹ decided that the agreement was void, because it was unlimited as to time; but on appeal to the judges in Exchequer Chamber the decision was reversed. Tindal, C.J., in delivering judgment said: "The ground upon which the court below has held this restraint of the defendant to be unreasonable is that it operates more largely than the benefit or protection of the plaintiff can possibly require; that it is indefinite in point of time, being neither limited to the plaintiff's continuing to carry on business at Taunton, nor even to the term of his life. We agree in the general principle adopted by the court, that, where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be, therefore, void. But the difficulty we feel is in the application of that principle to the case before us. Where the question turns upon the reasonableness or unreasonableness of the restriction of the party from carrying on trade or business within a certain space or district, the answer may depend upon various circumstances that may be brought to bear upon it, such as the nature of the trade or profession, the populousness of the neighbourhood, the mode in which the trade or profession is usually carried on; with the knowledge of which and other circumstances, a judgment may be formed whether the restriction is wider than the protection of the party can reasonably require."² The decision in this case is important for another reason: It lays down that the

¹ 7 Bing 735, 734. See also in this connection *Wallis v. Day* 2 M. and W. 273.

² 6 A. and E. 438 at p. 454.

question as to adequacy of consideration is immaterial, that is to say, the court in such a case would not go into the question as to whether the consideration was equal in value to the restraint agreed to by the defendant. The case of *Hitchcock v. Coker* was followed in India in 1868 (i.e. before the passing of the Indian Contract Act) in *D. W. Auchterlonie v. Charles Bill and another*.¹ It was laid down therein that in the case of a covenant in restraint of trade, the deed of covenant must show a good consideration, though the courts will not enter into the question of the adequacy of the consideration; and that a stipulation not to carry on the business of carriers on the road between two places was not void as being in restraint of trade. It was observed that the stipulation in question amounted simply to a contract by the vendors of the property and goodwill of the business, that they will not carry on the business of carriers at the same place and was the means by which a saleable value was given to the goodwill of the business. So partial a restraint is not really adverse to the interests of the public at large. The giving validity to such contracts 'offers', to use the words of Parke B. in *Mallan v. May*², "an encouragement to trade by allowing a party to dispose of all the fruits of his industry" and similar contracts have been upheld.³ The effect may be as in this instance to deprive a portion of the public of a present temporary gain resulting from the covenantors' competition, but contracts of the kind by giving a real marketable value to the goodwill of an established business operate as an additional inducement to individuals to comply their skill and capital in trade, and thus tend to the advantage of the general public interest, provided of course that the limits of the restraint are not in excess of what is reasonable to secure the enjoyment of the goodwill sold.

One important point that emerges from the cases which were decided during the period under discussion is as to whether the duration of the restraint is material to the question of validity or otherwise of the restraint. In *Ward v. Byrne*⁴ a town traveller and collecting

¹ 4 M.H.C.R. 77.

² 11 M. and W. 666.

³ See *Leighton v. Wales* 3 M. and W. 545.

⁴ 5 M. and W. 548 s.c. 151 Eng. Rep. 232.

clerk in the service of a coal merchant had given a bond not to solicit or sell to any customers of his employer within two years of leaving service, and not to follow or be employed in the business of a coal merchant for nine months after leaving. It was held that such an agreement was in general restraint of trade. Parke, B., observed: "Now a restraint prohibiting a party from carrying on trade within certain limits of space would be good, and a contract entered into for the purpose of enforcing such an agreement as that would be valid; and the limit of the space is that which according to the trade he carries on is necessary for the protection of the party with whom the contract is made; and all the cases cited appeared to turn on the question as to the limit of space within which the restriction should extend. Now, where a limit as to space is imposed, the public, on the one hand, do not lose altogether the services of the party in the particular trade—he will carry it on in the same way elsewhere—nor within the limited space will they be deprived of the benefit of the trade being carried on, because the party with whom the contract is made will most probably within those limits exercise it himself. But when a general restriction, limited only as to time, is imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit whatever in return."¹ Lord Abinger, however, in the same case did not give his decision on the basis of space or time limit as affecting validity but put it on the ground that the restriction was wider than would be necessary for securing the plaintiff's rights. "If in the present case," he said, "the plaintiff had been contented to take from the defendant an obligation which could not extend further than the injury to himself would extend by the violation of it, that might be reasonable." In *Bunn v. Guy*² an attorney covenanted that he would not at any time after the appointed date practise as an attorney, solicitor or conveyancer, within the City of London or a hundred and fifty miles from thence. Here it will be observed the restraint was unlimited

¹ *Ibid.*, at p. 561-562.

² 4 East 190, s c. 102 Eng. Rep. 803.

as to time, though limited as to space. It was held that the contract was good and binding.

In *Davis v. Mason*¹ the contract was not to practise as a surgeon for fourteen years within ten miles of the place where the employer lived in consideration of his taking the employer as an assistant in his business as a surgeon. It was held that the restriction was not unreasonable. In *Hastings v. Whitley*² one Watson a surgeon and apothecary took the defendant as his assistant who executed a bond not to carry on the business of a surgeon and apothecary after the termination of the engagement within ten miles of Stourport without Watson's consent. One of the points urged on behalf of the defendant was that the bond was illegal and void if it should be construed to extend to the defendant's practising his profession after Watson's death. The court held that the bond was valid and that the period of restraint continued up to the death of Whitley. In *Whittaker v. Howe*³ an agreement by a solicitor for valuable consideration not to practise as a solicitor in any part of Great Britain for twenty years without the consent of the plaintiff to whom he sold his business was held to be valid.⁴ There the restraint was not unlimited, but it might obviously have lasted for years after the plaintiff's death.⁵

¹ 5 T.R. 118; s.c. 101 Eng. Rep. 69.

² (1848) 2 Exch. 611.

³ 3 Beav. 383; s.c. 49 Eng. Rep. 150. This case was referred to with approval by Lord Macnaghten in *Nordenfelt's case* (1894) A.C. at 573.

⁴ A similar agreement was upheld in the case of an English Barrister practising at Shanghai. *Noel Charles Minchin Home v. John Charles Edward Douglas* 17 C.W.N. 215 P.C.

⁵ The following is an interesting collection of cases in which restrictive stipulations have been held valid:—not to practise for fourteen years within 10 miles of a given place; at any time within seven miles; at a given place or within twelve miles thereof, without the covenantor's consent during his lifetime, or within 10 years after his decease. One about to remove from a village agreed, in consideration of \$500 to sell defendant his practice, and to recommend him to his patrons and to use his influence in his favour, reserving the right to practise in the village when called on to do so. It was held that he could recover the \$500 from the defendant. A contract "not to locate, with a view of resuming his profession, within a circle of thirty miles around T.," was upheld. The same conclusion was reached with respect to a sale, of a house and practice, with a condition "not to establish, nor attempt to establish, a medical practice within the aforesaid township of Chili, nor within six miles of" the house; so a similar sale with a condition not to practise in the town or within fifteen miles thereof "by himself, agent, or otherwise," was held not so far restrictive as to contravene public policy. A sale of land and a practice, with a stipulation not to resettle in M. so long as the plaintiff should be located there, allows the vendor to practise, but not to reside there.

A guarantee by the vendor "that no other physician, for the space of

In the case *Tallis v. Tallis*¹ the defendant *inter alia* covenanted "not directly nor indirectly to be concerned in the canvassing trade in London, or within a hundred and fifty miles of the General Post Office, nor in Dublin nor Edinburgh or within fifty miles of either, not in any town in Great Britain or Ireland in which the plaintiff or his successors might at the time have an establishment or might have had one within the six months preceding." It was held that the restraint was good as it was not unreasonable. The case is of special importance because it lays down for the first time that there is no presumption against the validity of a covenant in restraint of trade.

Leather Cloth Co
v *Lorson*

The case of *Leather Cloth Co. v. Lorson*² which came on in the year 1869 stands out prominent for two reasons. First, it is a case on a somewhat different plane, the contract in question being one for the sale of a trade secret. Secondly, it represents a determined attempt to get out of the rigid rule sought to be laid down in the previous decisions on the subject of general restraint of trade as affecting validity of a contract. The vendors of an American process of manufacture to a company covenanted that they "will not directly or indirectly carry on, nor will they, to the best of their power, allow to be carried on by others, in any part of Europe, any company or manufactory having for its object the manufacture or sale of productions now manufactured in the business or manufactory" (of the vendors) "and will not communicate to any person or persons the means, or processes of such manufacture, so as in any way to interfere with the exclusive enjoyment by the purchasing company of the benefit hereby agreed to be purchased." James, V.C., said: "No doubt the covenant is expressed in very large and full terms, and it is insisted that the mere fact that the covenant is 'not

four years, will establish himself in this place, as a competitor unless the increased population of the place should warrant it" or unless through the purchaser's fault, and agreeing in the former event, to refund the purchase money, is valid; and a contract not to practise medicine nor in any manner do business as a physician in the county of Oswego at any time after May 1st, 1851, was sustained. The same principles govern restrictive contracts between dentists:—Spelling's 'Trusts and Monopolies,' p. 19.

¹ 1 E. and B. 391; S.C. 118 Eng. Rep. 482.

² L.R.G Eq. 345.

to carry on or allow to be carried on in any part of Europe' is in itself what is called a general restraint of trade, and that what is called a general restraint of trade is a restraint of trade throughout the United Kingdom, and that in that form a restraint of trade extending throughout the United Kingdom is upon the face of it bad, though something short of it may be allowable, provided the circumstances justify it. I do not read the cases as having laid down that un rebuttable presumption * * * * All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract. . . . I am satisfied that those words 'so as in any way to interfere with the exclusive enjoyment of the company' do properly, and sufficiently modify and qualify it; the principle being that you are not to have any more restraint than is necessary for the benefit of the purchasers. The company say, we do not ask for any unreasonable or capricious restraint upon you, we only ask you to bind yourself not to do something which will interfere with that which you profess to sell to us, and for which you have received a consideration. I am of opinion, therefore, that the covenant is one capable of being enforced in this court."

The case of *Allsopp v. Wheatcroft*¹ represents the opposite tendency, viz. to adhere to the already recognised rule as to limitation of space being necessary in order that a contract in restraint of trade may be valid. The fact that it does betray that tendency will appear very clearly from the following observations of Wickens, V.C., "The question," says he, "in this case is purely legal, viz. as to the validity of the covenant in restraint of trade. There has been a natural inclination of the courts to bring within reasonable limits the doctrine as to these covenants laid down in the earlier cases, but it has generally been considered in the later as well as in the earlier cases that a covenant not to carry on a lawful trade,

*Allsopp v.
Wheatcroft*

Rule as to limitation of space.

¹ L.R. 15 Eq. 59.

unlimited as to space, is on the face of it void. This seems to have been treated as clear law in *Ward v. Byrne*¹ and in *Hinde v. Grey*,² and in other cases; and the rule if not obviously just, is at any rate, simple and very convenient. No doubt, in the case of the *Leather Cloth Co. v. Lhorsont*, Lord Justice (then Vice-Chancellor) James threw some doubt on the existence of a hard and fast rule which makes a covenant in restraint of trade invalid if unlimited in area; but there were expressions in the instrument in that case limiting the generality of the covenant, and it was in substance a case of a different class from this, since the restriction against trading was only a consequence of a clearly lawful restriction against divulging a trade secret. In this point of view it may probably be thought to bear some analogy to *Wallis v. Day*.³

"Assenting, as I do, to everything that was said in *Leather Cloth Co. v. Lhorsont*, I can hardly treat it as authorising me to depart from the recognised rule as to limitation of space in a case so different from it as the present is, and unless that rule be departed from the covenant here is clearly bad."

But the Vice-Chancellor, after discussing the trend of previous cases, proceeded to consider the facts of the case before him and observed that even if no rule existed, the conclusion in this case would be the same—because the covenant in question therein was such as could not be reasonably required for the plaintiff's protection. He, therefore, held that independently of any absolute rule the covenant in question was inoperative.

Then followed the case of *Rousillon v. Rousillon*⁴ and we find Sir Edward Fry breaking away completely from the old position, and declaring that the 'absolute restraint' so-called is void only in so far as it is unreasonable, thus coming to an altogether new test or standard for ascertaining the validity of contracts in restraints of trade. The plaintiffs were champagne merchants at Epernay in France; they

*Rousillon v.
Rousillon.*

¹ See *supra*.

² 1 Man and G. 195; s.c. 133 Eng. Rep. 302.

³ 2 M. and W. 273; s.c. 150 Eng. Rep. 759.

⁴ 14 Ch. D. 357.

had also an office in London. They were not the proprietors of any vineyard but they bought grapes, manufactured and bottled the wine and exported the same to England and other countries. The defendant was employed by them originally as a clerk and afterwards as a travelling agent and he covenanted not to represent any other champagne house for two years after leaving the plaintiffs and also not to establish himself nor associate himself with other persons or houses in the champagne trade for ten years in case he should leave the plaintiffs. Later on the defendant left the plaintiffs and started in business as a retail wine-merchant in London, selling champagne and other wines. The plaintiff had meanwhile given up their retail trade. They instituted an action against him in France on his covenant and obtained a judgment and then sued him in England on the foreign judgment, claiming an injunction to restrain the defendant from carrying on the business of a champagne merchant for ten years as agreed and for other reliefs. Fry, J., following *Leather Cloth Co. v. Lhorsont* and differing from the principle laid down in *Allsopp v. Wheatcroft*, said that there was no such thing as an absolute rule that a covenant in restraint of trade is void because there is no limit as to space. The decision is an important one and I will, therefore, give here the gist of it in Fry, J.'s, own words: "But then it is said that over and above the rule that the contract shall be reasonable, there exists another rule, viz. that the contract shall be limited as to space and that this contract being in its terms unlimited as to space and, therefore, extending to the whole of England and Wales must be void. Now in the first place let me consider whether such a rule would be reasonable. There are many trades which are carried on all over the kingdom which by their very nature are extensive and widely diffused. There are others which from their nature and necessities are local. If this rule existed it would afford a complete protection to the latter class of trade, whilst it would prohibit complete protection of the former class, and an injury which ought not to be wrought without good reason would arise. In the next place, the rule if it existed would apply in two classes of cases. It would apply

where the want of a limitation of space was unreasonable, and also where it was reasonable. Now, in the former class of cases, those in which the universality was unreasonable, the rule would operate nothing, because the ground is already covered by the rule that the restraint must be reasonable. It would, therefore, only operate in cases in which the universality of the prohibition was reasonable; that is it would only operate where it ought not. For the existence of such a rule I should require clear authority. In the next place, the rule is pressed upon me as an artificial rule, an absolute rule, or, as, it was called by the late Vice-Chancellor Wickens a 'hard and fast' rule. Such a rule might always be evaded by a single exception. No exception can be said to be colourable to a rule of this description, because you can only judge whether an exception be colourable or not by the principle of the rule, and if the rule be really an artificial one, without principle, there is no criterion for saying whether the evasion is colourable or not. It appears to me for these reasons that I ought not to hold such a rule to exist unless it be clearly established." He then reviewed and criticised previous decisions on the question, and proceeded as follows: "I have, therefore, upon the authorities, to choose between two sets of cases, those which recognise and those which refuse to recognize this supposed rule; and, for the reasons which I have already mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognize this rule, and I consider that the case in which an unlimited prohibition has been spoken of as void, relate only to circumstances in which such a prohibition has been unreasonable." In the case of *Mills v. Dunham*¹ there was an agreement that the defendant after the termination of his engagement with the plaintiff should not either on his own account or for any employer "call upon or directly or indirectly solicit orders from, or in any way deal or transact business with" any one who had been a customer of the plaintiffs. The contract was held good and binding. The words "transact business with" was construed to mean business of the same or a similar

¹ (1891) 1 Ch. D. 576.

kind to that which had been carried on by the plaintiffs. Such a contract was held to be valid and reasonable though there was no limitation as to time or distance.

We come now to the epoch-making case of *Nordenfjelt v. Maxim Nordenfjelt Guns and Ammunition Company*.¹ *Nordenfjelt case.* The defendant who was interested in several businesses, including the business of a manufacturer of guns and ammunition, in 1886 sold the latter business for a large sum to a limited company, whose business was, in 1888, taken over with the concurrence of the defendant by the plaintiffs, another limited company incorporated partly for that purpose; and the plaintiff company and the defendant entered into an agreement whereby the defendant was to act as their managing director at a fixed salary the defendant (who was then forty-six years of age) covenanting that he would not "during the term of twenty-five years from the date of the incorporation of the company, if the company shall so long continue to carry on business, engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns, gun mountings or carriages, gunpowder, explosive or ammunition or in any business competing, or liable to compete, in any way with that for the time being carried on by the company"; but other businesses in which the defendant was interested were excepted from the restriction. Under that agreement the defendant acted as the plaintiff company's managing director until 1890 when he ceased to be so; and he afterwards joined a rival gun and ammunition company. The plaintiff company thereupon brought an action against the defendant to enforce his covenant by injunction. The defendant pleaded that the restrictive clause was void and inoperative. Romer, J., held that the clause was unreasonable and void and decided the case in favour of the defendant. The Court of Appeal—consisting of Lindley, Smith and Bowen, L.JJ.—held that the covenant, as restricted to the gun and ammunition business, though unlimited as to space, and practically covering the remainder of the defendant's life, was, under the circumstances, reasonable. Lindley, L.J., while observing that the

¹ (1894) A.C. 535.

principle on which the old division of restraints into general and partial depended ought not to be lost sight of, referred to a large number of decisions, which on ultimate analysis would appear to be based on the two underlying principles, viz. (1) the restraint must not be greater than the protection of the covenantee requires and (2) the covenant taken in connection with the business to which it refers must not be injurious to the public interests¹

The case went up in appeal to the House of Lords and was argued for three days. A considered judgment was given and the appeal of the defendant was dismissed. In the several judgments delivered by the Law Lords the whole history of the doctrine of invalidity of restraints upon trade was reviewed and the cases discussed threadbare. It is impossible to give an adequate idea of the learning erudition and independence shown in the judgments without making long extracts from them, but I cannot help giving a few extracts in view of the gravity of the case. In conclusion the House laid down two simple principles, governing all contracts in restraint of trade, namely, first, the sole test of the validity of such a contract is its reasonableness in the interest of the covenantee, and, secondly, the covenant must not otherwise offend against public policy. Lord Macnaghten observed: "Restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."²

¹ (1893) 1 Ch. at pp. 648–649

² Followed in *Sir W. C. Leng & Co., Ltd. v. Andrews* (1904) 1 Ch. 763. The remarks of Farwell, L.J. (at p. 773), in this connection are instructive. With reference to the passage quoted his lordship observed: "The argument which has been addressed to us on behalf of the respondents does not mean that an employer can prevent his employé from using the skill and knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information and that additional skill he is entitled to use for the benefit of the public who gain the advantage of his having had such admirable instruc

In regard to the difference of opinion between Vice-Chancellor James and Sir Edward Fry Lord Herschell's observations must be regarded as finally settling the controversy. He says: "There have been differing expressions of opinion on the subject by distinguished equity judges in more recent times. I will only allude to two of these, in which the existence of the rule I have been considering has been questioned. In the case of the *Leather Cloth Co. v. Lhorsont*, James, V.C., said: 'I do not read the cases as having laid down that un rebuttable presumption which was insisted upon with so much power by Mr. Cohen. All the cases when they come to be examined, seem to establish the principle, that all restraints upon trade, are bad, as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract.' And again in *Rousillon v. Rousillon*, Fry, J., thus expressed himself: 'I have therefore upon the authorities to choose between two sets of cases, those which recognise and those which refuse to recognise this supposed rule, and, for the reasons which I have mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognise this rule and I consider that the cases in which an unlimited prohibition has been spoken of as void relate only to circumstances in which such a prohibition has been unreasonable.' I do not intend to throw doubt on what was decided in these cases for reasons which will appear hereafter, but I respectfully differ from the view which appears to be indicated that there was not at any time a rule of the common law distinguishing particular from general restraints, and treating the former only as exceptions from the general principle that contracts in restraint of trade are invalid."¹

Then the Lord Chancellor proceeds to discuss the changed conditions of trade and commerce and to indi-

tion. The case in which the court interferes for the purpose of protection is where use is made, not of the skill which the man may have acquired, but of the secrets of the trade or profession which he had no right to reveal to any one else—matters which depend to some extent on good faith "

¹ (1894) A.C. at p. 546.

cate upon what view, properly speaking, the distinction between general and particular restraints, which theretofore prevailed, must be abrogated in order to bring the law into consonance with the needs of the times: "The discussion on which I have been engaged is, it must be admitted, somewhat academic. For, in considering the application of the rule and the limitations, if any, to be placed on it, I think that regard must be had to the changed conditions of commerce and of the means of communication which have been developed in recent years. To disregard these would be to miss the substance of the rule in a blind adherence to its letter. Newcastle-upon-Tyne is for all practical purposes as near to London to-day as towns which are now regarded as suburbs of the metropolis were a century ago. An order can be sent to Newcastle more quickly than it could then have been transmitted from one end of London to the other, and goods can be conveyed between the two cities in a few hours and at a comparatively small cost. Competition has assumed altogether different proportions in these altered circumstances; and that which would have been once merely a burden on the covenantor may now be essential if there is to be reasonable protection to the covenantee. When Lord Macclesfield emphasised the distinction between a general restraint not to exercise a trade throughout the kingdom and one which was limited to a particular place, the reason which he gave for the distinction was that 'the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by and by.' He returns to the subject later on, when giving the reasons why all voluntary restraints are regarded with disfavour by the law, in these terms: 'Thirdly, because in a great many instances they can be of no use to the obligee, which holds in all cases of general restraint throughout England, for what does it signify to a tradesman in London what another does at Newcastle? And, surely, it would be unreasonable to fix a certain loss on one side without any benefit to the other. The Roman law would not enforce such contracts by an action. (See Puffendorf lib, 5, c, 2, ss. 3, 21, H. 720.)' There are other passages in the judgment where this view is enforced.

"There is no doubt that with regard to some professions and commercial occupations, it is as true to-day as it was formerly that it is hardly conceivable that it should be necessary, in order to secure reasonable protection to a covenantee, that the covenantor should preclude himself from carrying on such profession or occupation anywhere in England. But it cannot be doubted that in other cases the altered circumstances to which I have alluded have rendered it essential, if the requisite protection is to be obtained, that the same territorial limitations should not be insisted upon which would in former days have been only reasonable. I think then that the same reasons which led to the adoption of the rule require that it should be frankly recognised that it cannot be rigidly adhered to in all cases. My lords, it appears to me that a study of Lord Macclesfield's judgment will show that, if the conditions which prevail at the present day had existed in his time, he would not have laid down a hard and fast distinction between general and particular restraints, for the reasons by which he justified that distinction would have been unfounded in point of fact. Whether the cases in which a general covenant can now be supported are to be regarded as exceptions from the rule which, I think, was long recognised as established, or whether the rule is itself to be treated as inapplicable to the altered conditions which now prevail, is probably a matter of word rather than of substance. The latter is perhaps the sounder view. When once it is admitted that, whether the covenant be general or particular the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law."

Thus *Nordenfelt's* case finally does away with the distinction between general and particular restraints on the ground that under the changed conditions of commerce and extended means of communication of the present day it has ceased to furnish a satisfactory test of the validity of restrictive covenants. The only test which now prevails is that of reasonableness of the covenant with reference to the parti-

Effect of the
decision in the
Nordenfelt case.

cular case. The reasonableness or otherwise of the covenant must be determined with reference to the character of the business and other surrounding circumstances. Different kinds of business require different degrees of protection. Thus different considerations must apply to trade secrets, apprenticeships and sales of goodwill, and more or less latitude in each of these particular cases may be justifiable on grounds of fair and reasonable protection to the parties concerned.¹ The test of reasonableness being the sole guide it follows that the distinction, formerly drawn between space limit and time limit, vanishes. Whether the restriction be as to space or as to time, it may be too wide having regard to all the circumstances of the case for protecting the interests of the parties concerned and, therefore, unreasonable and void.

Later cases.

*Mason v.
Provident Clothing
Co.*

The law laid down in *Nordenfelt's* case was followed in *Mason's* case.² *Mason* was engaged as a canvasser by the plaintiff company, carrying on the business of a general clothing and supplying company having branches all over England on the check and credit system "at London in the county of Middlesex (amongst other places)." By the contract of employment the defendant *Mason* agreed that he would not within three years after the termination of the employment be in the employ of any person, firm or company carrying on or engaged in a business the same as or similar to that of the plaintiff company or assist any person employed or assisting in any such business "within twenty-five miles of London aforesaid where the company carry on business." The House of Lords decided that the restriction was wider than was reasonably necessary for the plaintiffs' protection. The luminous observations of Lord Shaw afford a striking commentary on the principles underlying *Nordenfelt's* case and other leading cases. He observes: "The restriction lasts for three years and, as will be seen, is not confined to the appellant canvassing the customers of the old firm or in his old district. But he cannot, throughout any part of this great and densely populated area, take any engagement as a

¹ *Per* Lord Macnaghten at p. 566.

² *Mason v. Provident Clothing and Supply Company, Limited* (1913) A.C. 724 at p. 737 *et seq.*

canvasser with their trade rivals, nor can he be employed by them in any other capacity whatsoever. He may not be a manager, a book-keeper, a clerk, a messenger, a typist, a care-taker. The restriction, even granted the limit in time and in area as already stated is of a comprehensive and most extensive character. The question is whether this restriction is enforceable in a court of law. * * * * It is necessary, my Lords, to look, in the first place, at the nature of the contract itself. As to that, the diversities may be wide and the view of the law may be different as to the upholding or the scope of a covenant in restraint of personal or industrial freedom. If the contract, for instance, be for the sale of a business to another for full consideration or price, there may be elements going in the strongest degree to shew that such a contract—in so far as it restrains the vendor from becoming the rival of a business whose goodwill he has sold and which he has bargained he shall not oppose—there may be elements shewing that such a contract is enforceable, and, indeed that a declinature by the law to enforce it would amount to a denial of justice. * * * * In my opinion there is much greater room for allowing, as between buyer and seller, a larger scope for freedom of contract and a correspondingly large restraint in freedom of trade, than there is for allowing a restraint of the opportunity for labour in contract between master and servant or an employer and an applicant for work. * * *

* * My Lords, the law can achieve a reconciliation and adjustment of these two elementary liberties—the right to bargain and the right to work. And it has in fact achieved this in such a manner that the public interest has been in both cases conserved. * * *

* “For the rule evolved after much discussion may now be considered settled. The language of Tindal, C.J., in *Hitchcock v. Coker*² can now no longer be questioned as being the law, that ‘where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract

¹ *Ibid* p. 738-739

² (1837) 6 Ad and E. 438 at p. 454

which would enforce it must be therefore void.' This was adopted by Parke, B. in *Ward v. Byrne*¹ and is expressly founded upon by Lord Macnaghten in his analysis of the case law in *Nordenfellt*.² I cannot refrain from again quoting Lord Macnaghten's words: 'The true view at the present time, I think, is this: The public have an interest in every person carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.'

"I have referred, my Lords, to the apparent antagonism between the right to bargain and the right to work. The extreme of the one destroys the other. But the public interest reconciles these two, and removes all antagonism by the establishment of a principle and a limit of general application. It may be that bargains have been entered into with the eyes open, which restrict the field of liberty and of labour, and the law answers the public interest by refusing to enforce such bargains in every case where the right to contract has been used so as to afford more than a reasonable protection to the covenantee. In every case in which it exceeds that protection, the public interest, which is always upon the side of liberty, including the liberty to exercise one's powers or to earn a livelihood, stands invaded, and can accordingly be invoked to justify the non-enforcement of the restraint."

¹ 5 M. and W. 548

² (1894) A.C. at p. 565.

In a subsequent case,¹ the statement of the law as laid down by Lord Macnaghten was affirmed and *Mason's* case was followed. Herbert Morris Limited were the leading manufacturers of hoisting machinery in the United Kingdom, and the defendant Saxelby had been in the company's employment as draughtsman and otherwise from the time he left school. After several years' service the defendant was engaged by the company as engineer for two years certain and, thereafter, subject to four months' notice on either side, upon the terms of an agreement which contained a covenant by the defendant with the company that he would not during a period of seven years from his ceasing to be employed by the company, either in the United Kingdom of Great Britain or Ireland, carry on either as principal, agent, servant, or otherwise, alone or jointly or in connection with any other person, firm, or company, or be concerned, or assist, directly or indirectly, whether for reward or otherwise, in the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways, or hand overhead travelling cranes. The House of Lords came to the decision that the covenant was wider than was required for the protection of the plaintiff company and was not enforceable.² Lord Shaw observed: "Trade secrets, the names of customers, all such things which in sound philosophical language are denominated objective knowledge—these may not be given away by a servant; they are his master's property, and there is no rule of public interest which prevents a transfer of them against the master's will being restrained. On the other hand a man's aptitudes, his skill, his

Herbert Morris v Saxelby.

¹ *Herbert Morris Ltd v Saxelby* (1916) 1 A.C. 688.

² In the case of a pathologist a life-long restraint not to engage in similar work was held to be unenforceable. *Eastes v. Russ* L.R. (1914) 1 Ch. 468. In the case of a meat importer an agreement which precluded him from carrying on his natural business in any part whatever of the United Kingdom even for one year was held to be void as being in undue restraint of trade *S. V. Nevanas & Co. v. Walker and Foreman* L.R. (1914) 1 Ch. 413. In *Konski v. Peet* L.R. (1915) 1 Ch. 530 an agreement not to solicit customers was held not to be confined to persons who were customers during the employment, but extended to all persons who were customers at the date of the agreement or at any time after date, and was void being wider than was reasonable. As to how far a society is entitled to restrain the freedom of its members, by its rules, see *Osborne v. Amalgamated Society of Railway Servants* (1911) 1 Ch. 540; *Joseph Evans & Co. Ltd v. Heathcote and others* (1918) 1 K.B. 418; *McEllistrim v. Ballynacelligott Co-operative Agricultural and Dairy Society Ltd.* (1919) A.C. 548.

dexterity, his manual and mental ability—all these things which in sound philosophical language are not objective but subjective—they may and they ought not to be relinquished by a servant; they are not his master's property, they are his own property; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and to expand his powers is advantageous to every citizen, and may be highly so for the country at large."

*Hepworth Manufg.
Co v Ryott.*

It will be seen from the above that the two aforesaid cases have gone a great way to minimize the difficulties in respect of the conflict between the sanctity of contract and the right to work. The exposition of the law found therein formed the basis of the decision in the novel and interesting case of *Hepworth Manufacturing Co., Ltd. v. Ryott*.¹ The plaintiff company who were producers of kinematograph films, employed the defendant Ryott as a film actor. His contract of employment required him to act under a pseudonym, which should be the sole property of the plaintiffs. On the determination of the contract he was precluded from using the pseudonym for any purpose whatever and from film-acting for new employers unless and until they agreed not to announce or advertise his performance under the pseudonym. The defendant adopted the pseudonym of 'Stewart Rome' and owing partly to his own ability and partly to the plaintiff's advertisements the defendant acquired a considerable reputation so much so that in a newspaper competition as to who were the most popular kinematograph actors in this country, he obtained on a large poll the second place, being beaten only by the redoubtable Charlie Chaplin. The defendant joined a rival producing company known as Broadwest Films Ltd. and acted as and was advertised as Stewart Rome. The plaintiffs suit for an injunction was dismissed on the ground that the contract was in restraint of trade and not reasonably required for the protection of the employers.

This doctrine of reasonable protection to the employers has led the courts to consider the question of

¹ (1920) 1 Ch. D. 1.

severability of a covenant. If a covenant is too wide, i.e. wider than is reasonably necessary for the protection of the party concerned, will the courts refuse to enforce it altogether or will treat it as severable and enforce such parts of it as are reasonably necessary for the protection of the party concerned? The answer given is that such contracts are severable. The case of *Goldsoll v. Goldman*,¹ is an illustration of this proposition of law. The plaintiff and the defendant were dealers in imitation jewellery. To avoid competition the defendant Goldman sold his business to the plaintiff and covenanted that he would not for the period of two years "either solely or jointly with an agent or employee or any other person or persons or company directly or indirectly carry on or be engaged, concerned or interested in or render services (gratuitously or otherwise) to the business of a vendor of or dealer in real or imitation jewellery in the County of London or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man or in France, the United States, Russia or Spain, or within twenty-five miles of Potsdamerstrasse, Berlin, or St. Stephans Kirche, Vienna." In an action for an injunction against the defendant for having committed breaches of covenant, it was held that the covenant not to carry on business in the United Kingdom or the Isle of Man, and the covenant not to deal in imitation jewellery, were severable from the rest, and these portions of the entire covenant could be enforced being not wider than was reasonably necessary for the plaintiff's protection.

Severability of a covenant

Goldsoll v Goldman

The law in India

Turning now to the Indian law on the subject of restraints upon trade we find that the policy adopted is one of retrogression. It will have appeared from the above discussion that in England the tendency of decisions has been gradually but steadily to widen the narrow view of the common law as to restraints. The effect of section 27 of the Indian Contract Act is to narrow it down further. This is due to the fact that sec. 27 unfortunately follows the New York Draft Code which Pollock calls the 'evil genius of the Indian Contract Act.' The New York draftsmen

¹ (1915) L. R. 1 Ch. 292.

—based on the
American law.

were of opinion that “contracts in restraint of trade had been allowed by modern decisions to a very dangerous extent.”¹ Section 833 of the New York Draft Code represented this alarmistic view. Indeed the whole trend of American law on the subject of monopolies, as well as restraints, has been determined by an extreme dread of any restriction on the right of individual action. The cry of freedom raised with the Declaration of Independence rang in all departments of life and activity in America and the view that restraints in any shape or form must be done away with became supreme for the moment. To this awakened consciousness and love of freedom all considerations were subordinated and even judges waxed eloquent and spoke with more emotion than wisdom, when questions of restraint were under discussion. Take for instance the following observations of Mr. Justice Field, which forcibly expresses the typical American view. “As in our intercourse with our fellow men certain principles of morality are assumed to exist without which society would be impossible so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: ‘We hold these truths to be self-evident’—that is, so plain that their truth is recognised upon their mere statement—‘that all men are endowed’—not by edicts of Emperors or decrees of Parliament or acts of Congress, but—‘by their Creator, with certain inalienable rights’—that is, rights which cannot be bartered away or given away, or taken away, except in punishment of crime—‘and that among these are life, liberty and the pursuit of happiness and to secure these’—not grant them, but secure them—‘governments are instituted among men, deriving their just powers from the consent of the governed.’ Among these inalienable rights as proclaimed in that great document is the right of men to pursue their happiness by which is meant the right to pursue any lawful business or vocation in

¹ See Pollock and Mulla’s Indian Contract Act, 3rd Edition p. 167

any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them without let or hindrance except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birth right In this country it has seldom been held, and never in so odious a form as is here claimed, that an entire trade and business could be taken from citizens and vested in a single corporation. Such legislation has been everywhere else as inconsistent with civil liberty, that exists only where every individual has the power to pursue his own happiness according to his own views, unrestrained, except by equal, just and impartial laws."

Such being the view of freedom, the New York Code would obviously represent a proportionately stringent view towards contracts in restraint of trade. Singularly enough, the Indian law copies its provisions, although the conditions of trade and industry in this country are vastly different from those obtaining in America. Section 27¹ runs as follows:—

Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind is to that extent void. Sec. 27, Indian Contract Act.

Exception 1. One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein: Provided that such limits appear to the court reasonable, regard being had to the nature of the business.

¹ The first paragraph is taken almost word for word, and the first and second exceptions with slight variations, from the New York Draft Code.

Exception 2. Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership, within such local limits as are referred to in the last preceding exception.

Exception 3. Partners may agree that some one or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership.¹

Indian case-law on the subject of restraints.

One of the earlier cases under the section was that of *Oakes & Co. v. Jackson and another*.¹ There two persons had entered into an agreement that on the expiry of five years, the period of their service under the agreement, or sooner determination of the service, they would not carry on within 800 miles of Madras any business carried on by the plaintiff's firm, and they also covenanted that on such expiry, or sooner determination, they would, whenever requested by the firm so to do, return to England. Eventually they refused to return to England and proceeded to set up and carry on on their own account, business of the same kind as that carried on by the plaintiff's firm. It was urged for the plaintiff company that it was of the greatest importance to the interests of the mercantile community in India and, in fact, to the whole community that such a contract should be upheld. On the decision whether such contracts would be valid or not depended the question as to whether employers of labour in India would be able to bring out skilled artificers from England. It was argued that if an artificer brought out at the expense of his employers, could not be tied down by an agreement such as that the employer would be exposed to a practical robbery of his customers by the employee whom he had brought out. It was held by Kindersley, J., that the covenant was void under Sec. 27 of the Indian Contract Act. "I am by no means satisfied," he observed, "that the omission to except such a case as this from the operation of the general rule was unintentional. Trade in India is in its infancy; and the legislature may have wished

¹ I.L.R. 1 Mad. p. 134.

to make the smallest number of exceptions to the rule against contracts whereby trade may be restrained."

The scope of the section has, however, been somewhat restricted by various decisions. Thus it has been held that the fact that the scheme of an agreement would limit competition and keep up prices does not bring it within the terms of section 27. To succeed in the defence under the section, one must establish that the suit is one to enforce an agreement whereby some one is restrained from exercising a lawful profession, trade or business of any kind.¹ A stipulation in a contract prohibiting any sales of goods of a certain description to any others during a particular period, is not in restraint of trade within the meaning of the section.² When, again, one having a licence for the manufacture of salt entered into a contract with a firm of merchants to the effect that he should not manufacture salt in excess of the quantity which the firm, at the commencement of each manufacturing season, should require him to manufacture, and that all salt manufactured by him should be sold to the firm for a fixed price; it was held that the second clause was not void under section 27 and that it was separable from the first.³ Mr. Justice Handley observed: "In one sense every agreement for sale of goods whether *in esse* or *in posse* is a contract in restraint of trade, for, if *A.B.* agreed to sell goods to *C.D.*, he precludes himself from selling them to anybody else. But a reasonable construction must be put upon the section and not one which would render void the most common form of mercantile contract. I understand the section to aim at contracts by which a person precludes himself altogether either for a limited time or over a limited area from exercising his profession, trade or business, not contracts by which in the exercise of his profession, trade or business, he enters into ordinary agreements with persons dealing with him

¹ *Fraser & Co. v. Bombay Ice Manufacturing Co* 7 Bom. L.R. 107, I.L.R. 29 Bom. 107

² *Carlisle's Nephews & Co. v. Ricknauth Bucktearmull* I L.R. 8 Cal. 309. See also *Tan Khwin Hong v. Maing Kegaw* 18 I.C. 183

³ *Mackenzie and others v. Strirmiah* I L.R. 13 Mad. 472. See also I.L.R. 15. Mad. 79.

which are really necessary for the carrying on of his business. I think I am supported in this decision by the Calcutta cases of *Carlisles Nephews & Co. v. Ricknauth Bucktearmull*; *Prem Sook v. Dhurum Chand*, and by the principles which govern the English decisions upon the subject."

The agreement must be in restraint of some trade or business. A landlord who in return for market tolls or fees, allows a cattle market to be conducted on his land does not thereby exercise the trade or business of selling cattle. Therefore, an agreement between the owners of two neighbouring lands to the effect that a market for sale of cattle shall not be held on the same day on the lands of both of them is not void under s. 27 of the Contract Act and can be enforced.¹ It has also been held that an agreement between a merchant and a broker to sell all his goods through the latter is not in restraint of trade.² A contract under which goods were purchased at a certain rate for the Cuttack market, containing a stipulation that if the goods were sent to Madras a higher rate should be paid for them was held to be one not in restraint of trade.³ An interesting case⁴ came up as early as the year 1874 before Sir Richard Couch, C.J. and Pontifex, J., on a reference by the First Judge of the Court of Small Causes, Calcutta, for the opinion of the High Court. The plaintiff was a brazier and had established a shop in the part of Calcutta named in his cause of action. The body of braziers carrying on business in the same locality held a public meeting at which it was resolved, among other things, that none of their body would employ more than four underworkmen, and that then the trade would return to its former prosperity. The plaintiff then interposed and said he could not conform to this resolution, as his business was so organized that it required from sixteen to twenty underworkmen to carry it on profitably; but he was willing to remove his shop

¹ *Polhi Ram v. Mussi. Islam Fatema* I.L.R. 37 All. 212; 27 I.C. 871; 13 A.L.J., 281.

² *E. G. Bushin v. Ramhissen Seal*, 23 W.R. 146

³ *Prem Sook and another v. Dhurum Chand and another* I.L.R. 17 Cal. 320.

⁴ *Madhub Chandra Poramanik. v. Raj Kumar Dass* 22 W.R. 370. 12 P.L.R. 76.

elsewhere, if his already expended advances were recouped to him. There was a general shout 'We will pay your advances; those who take on your workmen will pay.' The plaintiff objected saying that he did not wish to have a hundred guarantors to look to, but if any four or five would undertake to pay him the advances which he had already given to his men, he would remove. The defendants undertook accordingly, and the plaintiff sued them on this undertaking, which was verbal. The sum advanced to the workmen was proved to be Rs. 900. It was contended by the counsel for the defendants that this agreement was void under section 27 of Act IX of 1872, being 'an agreement by which the plaintiff was restrained from exercising a lawful profession, trade or business' and not coming under any of the three exceptions following that section.

The Judge of the Court of Small Causes had held that the defendant's agreement did not come within section 27 of Act IX of 1872, in as much as there was nothing in it restraining the plaintiff from setting up the same trade in some other locality, or even in the very next house to that which he then occupied for it. It was a mere engagement on his part to remove his business out of that house and perhaps it might be construed to have been the intention of the parties that he should remove it from that locality, but not an engagement restraining him from exercising that business altogether. He thought also that if the engagement did come within the meaning of section 27 it would only be void to that extent—viz. to the extent it restrained one of the parties from exercising his trade; but that it would still operate to make the consideration money payable to him. Couch, C.J., held that "the words 'restrained from exercising a lawful profession, trade or business' do not mean an absolute restriction, and are intended to apply to a partial restriction, a restriction limited to some particular place. Otherwise, the first exception would have been unnecessary. * * * * Section 27 was intended to prevent not merely a total restraint from carrying on trade or business, but a partial one. We have nothing to do with the policy of such a law. All we have to do is to take the words of the Contract

Act and put upon them meaning which they appear plainly to bear. In my opinion, they must be held to apply to such a case as the present, and the agreement on the part of the plaintiff not to carry on his business in that locality is to that extent void. * * * * If the agreement on the part of the plaintiff is void, there is no consideration for the agreement on the part of the defendants to pay the money, and the whole contract must be treated as one which cannot be enforced. Therefore * * * * the agreement is a void contract and the plaintiff has no right to recover the money which he has claimed.”¹ The case was followed in the case of *Brahmaputra Tea Co., Ltd. v. E. Scarth* in which, it was held that a contract under which a person is partially restrained from competing, after the term of his engagement is over, with his former employer, is bad under sec. 27 of the Indian Contract Act. Such contracts, said the judges, are well known in English law and the omission to make them an exception to the general prohibition contained in section 27 clearly indicates that it was not intended to give them legal effect in this country.² *Madhab Chandra Paramanik's* case was followed in another case in the year 1892.³ In that case the plaintiff was a ghat serang who along with another ghat serang entered into a contract with six dubashes who carried on business at Chittagong for the purpose of carrying on their respective business in unanimity and not injuring one another's trade. The contract which was to last for three years provided *inter alia* that the ghat serangs were to act only as such and do no service to the ships in any other capacity, that the dubashes were to give the plaintiff five vessels, secured by them, every year for him to act as ghat serang to ; and that the plaintiff was only to act as ghat serang to the said five ships, and with the exception of ships for which he had previously acted as ghat serang, he should not act as ghat serang or do any other services for ships belonging to any one else. The contract contained provisions as to the apportionment of the five ships so to

¹ 22 W. R. at p. 375.

² I. L. 11 Cal 545 at p 556

³ *Nur Ali Dubash v. Abdul Ali* I.L.R. 19 Cal 765 at p. 773

be given to the plaintiff amongst the various dubashes, and also a provision for the payment of Rs. 1,000 as damages by any one breaking the contract to the person who should suffer by the breach. In a suit on the contract by the plaintiff it was contended that the contract was void under sec. 27 as being in restraint of trade. It was held that there was a partial restraint in the agreement in question, that sec. 27 does away with the distinction observed in the English cases between partial and total restraint of trade and makes all contracts falling within its terms void unless they fall within its exceptions, and that consequently the agreement was void. To a similar effect is the decision in *Parasulla Mallick v. Chandra Kanta Das*.¹ The defendant Parasulla used to carry on business as a carrier of passengers by *gahana* boats between two places. The plaintiff set up a rival business and as the competition interfered very seriously with the defendant's profits, he agreed to pay to the plaintiff a large sum of money in consideration of the latter abstaining from carrying on the rival business along the same route for a period of three years. It was held that the consideration of the contract being the restraint of the plaintiff's rival business in *gahana* boats, the contract was void under the provisions of section 27 of the Contract Act.

The agreement of a physician not to practise for a limited period within a certain area was considered by the Bombay High Court in a case from Zanzibar.² The defendant Macdonald agreed on certain terms to become assistant for three years to the plaintiff Charlesworth, a physician and surgeon, practising at Zanzibar. The letter which stated the terms which the plaintiff offered and which had been accepted by the defendant contained the words "the ordinary clause against practising must be drawn up." No formal agreement was drawn up but the terms stated in the letter were strictly observed. At the end of a year a disagreement took place and the defendant ceased to act as the plaintiff's assistant and began to practise in Zanzibar on his account. In decreeing the plain-

¹ 21 C.W.N. 919, 39 I.C. 177.

² *Charlesworth v. Macdonald* I.L.R. 23 Bom. 103.

tiff's suit for injunction the court observed that there being no evidence of what "the ordinary clause against practising" was, it must be taken at least to be a contract not to practise at Zanzibar in competition with the employer during the period of engagement; such an agreement would be in furtherance and not in restraint of the exercise of a profession.

The question whether a contract which violates the provisions of section 27 of the Contract Act would be void, even if it had been carried out partially, came up for discussion recently before a Full Bench of the Lower Burma Chief Court.¹ The plaintiff in the case promised and undertook not in any way to set up or carry on a stevedoring business; the defendant in consideration of the plaintiff's promise agreed to pay a certain sum of money per month during the plaintiff's life. The agreement was observed for some months but the defendant afterwards refused to pay. The plaintiff brought a suit for recovery of the money. It was held that the agreement being in restraint of trade, the plaintiff was not entitled to recover.

The case of *Haribhai Mamklal v. Sharafali Isabji*² is one of the few Indian cases in which the question has arisen as to how far an agreement among traders or manufacturers to carry on their work under special conditions and stipulations as to price, etc., is against public policy as being in restraint of trade.³ I will, therefore, state the facts briefly. In that case the owners of four ginning factories with a view to prevent competition amongst them, entered into an agreement which provided *inter alia* that they should charge a uniform rate of Rs. 4-8 per palla of cotton to be ginned, and that they should treat Rs 2-8 of that sum as the actual cost of ginning, and that the remaining Rs 2 should be carried to a common fund which was to be divided each year between them in proportion to the number of gins which each of them possessed. The agreement was to continue in force for four years. The other parties carried out the agreement, but the defendant though he had

¹ *Hurry Krishna Pillai v. M. Anthilachary Ammal* 33 I C 238

² I L R. 22 Bom p 861

³ Cases of this description abound in England and America but they are rare in this country

credited Rs. 2 to a separate account refused to pay the plaintiff his share of the amount. The plaintiff sued the defendant to recover his share. The defendant contended that the agreement was in restraint of trade, and was, therefore, unenforceable. The court held that the plaintiff was entitled to recover his share from the defendant. Farran, C.J., thought that the stipulation that the parties should not charge more than Rs. 4-8 per palla was in restraint of trade. Candy, J., however, was inclined to the contrary view. The decision was put on the ground that the only agreement sought to be enforced in the suit was the agreement to divide the profit, which was perfectly lawful, and that there was no question in the suit to enforce any of the covenants alleged to be in restraint of trade. The decision was followed in a subsequent case,¹ where it was laid down that a combination in circumstances similar to the above, among managers of rival firms, was not unlawful.

In no case was the question as to the legality of contracts in restraint of trade under the Indian law so fully and thoroughly discussed as in that of *Shaikh Kalu v. Ramsaran Bhagat*.² In that case, the facts were as follows: The plaintiff was a merchant residing at Patna City who used to supply traders in Calcutta with combs. He took an agreement from the defendant Shaikh Kalu as well as twenty-eight other manufacturers of combs in the city of Patna whereby the latter agreed to supply him with combs and not to sell the same to any one else. The plaintiff Ramsaran did not execute the agreement. It was further stipulated that he was not bound to accept the goods manufactured if he found there was no market for them at Patna, Calcutta or elsewhere. It was held that the agreement was void as being in restraint of trade, the restraint being unreasonable within the rule of law laid down in recent English cases and certainly void under the wider language of sec. 27 of the Indian Contract Act. Under sec. 27 of the Contract Act whether the restraint is general or partial, unqualified or

¹ *Kuber Nath v. Mahali Ram* I L R 34 All. 587, 16 I.C. 631

² 13 C.W.N. p. 388, 9 C.L.J. 216, II C. 94

qualified, if it be in the nature of a restraint of trade, it is void. It was further held that it was void as being an attempt to suppress competition by means of contracts with independent manufacturers for their entire products, so as to monopolise the market. The case stands out in bold relief from others of its kind in India in as much as the court did not content itself with keeping within the four corners of the Act itself. Sir Ashutosh Mookerjee in delivering judgment went into the fundamental principles governing the validity of contracts in restraint of trade, passing in review all the more important English and American cases (including the *Nordenfjelt* case) as also the Indian cases beginning from that of *Madhab Chunder Poramanik*. The conclusion which Sir Ashutosh Mookerjee arrived at in regard to the scope and effect of sec. 27 of the Contract Act will appear from the following observations: "It is obvious, therefore, that the framers of the Indian Contract Act deliberately reproduced the provisions of sec. 833 of the New York Civil Code with the full knowledge that the effect would be to lay down a rule much narrower than what was recognised at the time by the common law. The rules of the common law, on the other hand, have since then been considerably widened and developed. The result is that the rule as embodied in sec. 27 of the Indian Contract Act presents an almost startling dissimilarity to the most modern phase of the English rule on the subject. As observed, however, by Sir Richard Couch in the case to which we have referred, we have nothing to do with the policy of the law, specially as the legislature has deliberately left the provision in sec. 27 in its original form, though other provisions of the Contract Act have from time to time been amended." In a later case¹ where the defendant, actor and proprietor of Allan Wilkie & Co., had contracted with the plaintiff, proprietor of the Grand Opera House, Calcutta, to play for him and not to play in any other theatre on his own or on some one else's behalf until after the expiration of the period contracted for, and until after his return from England, and where he had, in breach of the agreement, performed in another

¹ *E. M. D. Cohen v Allan Wilkie*, 16 C W N. 534

theatre after the expiration of the period contracted for, but before his return to England, it was held that under sec. 27 of the Contract Act the agreement being in restraint of a lawful profession, trade or business was void and as such could not be enforced by injunction. In another case¹ where one of two rival cooly suppliers agreed with the other not to supply coolies in consideration of the latter agreeing to pay the former a sum of money per month, it was held that the agreement was made with a view to avoid competition and hence was clearly an agreement by which the former was restrained from exercising a lawful trade or business.

There is a class of cases in which though the contract is not in restraint of any trade or profession it is in restraint of personal freedom. In such cases it has been held that the courts will not enforce a contract fettering a man's liberty of action as being contrary to public policy,² unless it be for his benefit.³ The principle has been applied to what are known as "slavery bond" cases and it has been held that a *harwahi* (ploughman's) bond—which bound down the executant to daily attendance and manual labour until the amount borrowed was repaid in a certain month and penalised default with 75 p.c. interest per year—is not enforceable.⁴ This case has been followed in a subsequent case.⁵ Two brothers executed a bond in favour of the plaintiff in which one of them agreed to remain all along in attendance and to do the work of the plaintiff and never to remain absent from duty. In case of absence it was stipulated that the whole amount mentioned in the bond would be recoverable with interest at one anna per rupee per month. It was observed that such a contract—in which a labourer engages to work without any payment whatsoever under conditions that make it practically impossible for him to discharge the debt until some other capitalist redeems him—is indistinguishable from slavery

¹ *P. P. Thangavelu Chetty v P. Muhunda Naidu* 21 I.C. 768.

² *Hornwood v. Millar's Timber and Trading Company, Limited* (1917) 1 K.B. 305

³ *Trustee of Denny v. Denny and Warr* (1919) 1 K.B. 583

⁴ *Ram Sarup Bhagat v. Bans Mandar*, 1 I.L.C. 42 Cal. 742, 17 C.W.N. 1118; 30 I.C. 953.

⁵ *Satish Chandra Ghosh v. Kashi Sahu* 3 P.L.J. 412; 46 I.C. 418.

and in practice compels the debtor and his descendants to a perpetual serfdom. The contract was held to be wholly void and the plaintiff was refused any relief whatsoever.¹ It may be observed, however, that a stipulation in a bond to work for a specified term in lieu of payment of interest—is enforceable. There is little difference between such a contract and one of apprenticeship or indenture.²

¹ The contrary view taken in the case of *Anandiram Mandal v Gora Kachori* 27 C L J. 459; 45 I C. 965 (decided *ex parte*) is, it is submitted, bad law.

² *Ponnusami v. Palayathan* 51 I C 25.

LECTURE X.

COMBINATION OF LABOUR.

In one sense agreement in restraint of trade may be taken to cover a wide area and to include agreement among labourers to raise wages, and agreement among employers to reduce wages. But such treatment has evident disadvantages. Trade and labour combinations have their peculiar causes and characteristics and for purposes of accurate understanding, it is not only convenient but necessary to study their incidents separately and discuss their legal bearing in the light of the conditions which bring them into existence. Obviously, both employers and workmen have a right to combine within limits. The question is what those limits are. According as these limits are observed or not, the combinations of both classes may be lawful or otherwise.

The principle on which such combinations may be countenanced by law is comprehensively expressed by Chief Justice Campbell in *Hilton v. Eckersley*¹ "I cannot bring myself to believe that if two workmen who sincerely believe their wages to be inadequate should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence or any illegal means for gaining their object, they would be guilty of a misdemeanor, and liable to be punished by fine and imprisonment. The object is not illegal and, therefore, if no illegal means are to be used there is no indictable conspiracy. Wages may be unreasonably low or unreasonably high, and I cannot understand why in the one case workmen can be considered as guilty of a crime in trying by lawful means to raise them, or masters, on the other, can be considered guilty of a crime in trying by lawful means to lower them."

It will be observed that the above remarks of Campbell, C.J., amount to this that the rule against

¹ 6 E. and B. 47, 62, s c 119 Eng. Rep. 781

restraint of trade is not to be extended to combinations among employees, on the one hand, to raise wages, or to combinations of employers, on the other, to reduce wages. One reason for the partiality to the employers and the workingmen may be the sentiment so often expressed, namely, that they after all are the people legally responsible for the general prosperity of the country, and the other reason perhaps is the utter inutility of putting stumbling blocks in their way. They have always managed to hold their own against odds, and they had better be let alone to arrange for wages, etc., according to their respective interests, if only they would do so by proper methods, i.e. without violence, threat or intimidation, and without molesting or obstructing any one else.

On the other hand, owing to the increasing power of the working class vote and the growing belief, admitted by economists, that individual labour cannot bargain on equal terms with employers and that the just interests of labour require the force and protection to be derived from combination, it was felt that association was essential for many useful forms of economic activity. A marked change of opinion took place in favour of labour combination during the nineteenth century, and such combination was gradually admitted as necessary for the protection of the rights and interests of labour. This change of opinion is well reflected in the observation of Cockburn, C.J., in *Wood v. Brown*.¹ "And we ought, as long as nothing is done contrary to the law, to leave it open to labour on the one hand and capital on the other to make the best terms they can for themselves. Large numbers of men, who have not the advantage of wealth, very often can protect their own interests only by means of association and co-operation and we ought not to strain the law against men who have only their own labour and their association by which they can act in the assistance of one another." The aim of law, in modern times, has thus been to safeguard associations so far as socially beneficial, while retaining a weapon of defence against harmful forms of associations. Labour combination, therefore, is now not regarded

¹ (1866) L.R. 2 Q.B. 21 at p. 25.

as necessarily harmful or against public policy but is judged by its purpose and results.

This is the present position. But it has not always been so. The modern view is the opposite of that embodied in the earlier English statutes. Labour and capital are now regarded as on the same footing and equally entitled to freedom in regard to combination for the protection of their own interests, but under the earlier statutes they came in for little favour, the advantage being all on the side of their employers. Take for instance the Statute of Labourers of 1349 and 1359.¹ They provided that every man and woman of whatever condition able in body, and within the age of three score years, "being required, shall be bound to serve him that doth require him, or else committed to the gaol, until he finds surety to serve." Thus such service was compulsory, and in default the labourer was to be visited with imprisonment. Besides, he was not to get more than the customary wages. These statutes were intended to check the rise in wages and meet the scarcity of labourers caused by the Black Death. They were the first of a series passed to impede the free operation of labourers. The statute of Henry VI of 1424, the statute of Edward VI (1548), the statute of Elizabeth (1562) were all directed against labourers. The last one was entitled "An Act containing diverse orders for artificers, labourers, servants of husbandry and apprentices." Other enactments too numerous to mention, were passed from time to time whereby the legislature endeavoured to fetter the hands of the labourer as far as possible. What the labourer failed to do by individual effort, he tried to achieve by combination with fellow labourers. Diverse forms of combined action were attempted and the result was, among others, the statutes of 1799 and 1800 directed against combination to raise wages. The following observations of Mr. Justice Stephen give a clear idea of the effect and scope of the combination laws. He says: "It is obvious that whatever may have been the immediate occasion of the laws in question they carried out and developed to their natural and legit-

¹ 23 Ed. IV and 25 Ed. III, C I.

imate conclusion a great mass of earlier legislation, going back to the Statute of Labourers, which again has relation to the still earlier period when a considerable part of the population were serfs. First, it is enacted that labourers and mechanics are to work at certain wages and to reside at certain places. In process of time this became inconsistent with the altered circumstances of society and a system is substituted for it under which wages are still to be fixed, and all mechanics are to go through a regular apprenticeship for seven years, all the conditions as to the taking of apprentices being carefully regulated by act of parliament. Incidentally, combinations to raise wages are forbidden, but with no detail. This system also breaks down as new trades spring up, and numbers of workmen are collected in manufacturing towns and brought into a proximity to each other which cannot but make them feel their own power and suggest to them that, as against their employers, they have common interests which may be promoted by combinations. The difficulties which arise from this conflict between the existing law and the new facts are at first provided for by particular statutes relating to particular trades. At last they are made the subject of a general act, which applies in the most detailed, specific, uncompromising way the principle upon which all the earlier legislation had depended. Workmen are to be contented with the current rate of wages, and are on no account to do anything which has a tendency to compel their employers to raise it. Practically, they could go where they pleased individually and make the best bargains they could for themselves, but under no circumstances and by no means, direct or indirect, must they bring the pressure of numbers to bear on their employers or on others."¹

One very significant reason for the passing of the earlier statutes was that the State undertook, chiefly through the Justices of the Peace, to control and fix fair wages and fair prices for food.² So long as this

¹ Stephens Hist Crim Law, Vol III, p 208

² See Statute of Labourers 1350, 25 Ed IV C 6—The justices shall hold their sessions four times a year and all times needful to enquire into wages and prices for food

See also Statute of Labourers, 1349, 23 Ed IV C. 6—Victuals shall be sold at a reasonable price.

State machinery was supposed to function, private combinations could not be allowed to intervene. State control, however, failed during the Industrial Revolution and the Statute of Apprentices, etc., was repealed in 1813. But owing to fear of popular rebellion, increased by the French Revolution, and owing to predominance of the doctrine of natural liberty, the penal laws against combination were continued till 1824.

A safer and more practical policy led the legislature in that year to repeal all the enactments which had up to that time stood in the way of free exertion on the part of labourers to protect their own interests. The Act of 1824¹ provided *inter alia* as follows: "That journeymen, workmen, or other persons who shall enter into any combination to obtain an advance or to fix the rate of wages or to lessen or alter the hours or duration of the time of working, or to decrease the quantity of work, or to induce another to depart from his service before the end of the time or term for which he is hired, or not being hired, to refuse to enter into work or employment, or to regulate the mode of carrying on any manufacture, trade or business or the management thereof, shall not therefore be subject or liable to any indictment or prosecution for conspiracy, or to any other criminal information or punishment whatever, under the common or the statute law." Then followed the Act of 1825² which was directed against the exercise of violence, intimidation, undue persuasion and unwarrantable interference with the rights of others. At the same time it expressly provided that it would not affect any combination the object of which was to raise wages or prices or any meeting held in that behalf. By the Acts of 1824 and 1825 the legislature for the first time endeavoured to place capital and labour on a footing of equality. The principle laid down was that if capital could be allowed to combine for lowering wages, labour must also be allowed freedom to combine for the purpose of raising wages. Both forms of conduct were lawful provided that they were for the purpose of a legitimate trade object

¹ 5 Geo. 4, C 95

² 6 Geo. 4, C 129.

and not in pursuit of a malicious purpose to ruin or injure a person and the means employed for carrying out their respective objects was not unlawful, or oppressive. In the year 1871 was passed the Trades Union Act¹ and also an Act² to amend the criminal law relating to "violence, threats and molestation" directed towards checking unlawful methods often resorted to by labourers. In 1875 it was found expedient to repeal the Act of 1871 and the Conspiracy and Protection of Property Act, 1875³ was passed to take its place. It provided that "An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy, if such act committed by one person would not be punishable as a crime."⁴

Thus the law as to labour combinations is not only the result of a series of judicial decisions but also a series of legislative enactments. The legislation has uniformly been in the direction of allowing greater freedom to employers as well as to workmen. Such freedom is only to be checked when the circumstances show an attempt on their part to resort to unlawful, violent or oppressive methods.

The leading cases also lay down the same principle, and declare that only acts such as boycotting, picketting, intimidation, molestation, etc., amount to unlawful methods. In *Reg v. Selsby*⁵ the circumstances were such as to show that the defendants were guilty of resorting to unlawful methods, hence some of them were found guilty of the conspiracy charged. The defendant had attempted to dictate what workmen should be employed and to give a warning that no journeymen who were not members of certain trades unions should be given work. They failed to attain their object and thereupon they struck and circulated bills announcing that pickets had been established round the foundry. The following words from the charge to the jury by Baron Rolfe will show how he

¹ 34 and 35 Vict. C. 31.

² 34 and 35 Vict. C. 32.

³ 38 and 39 Vict. C. 86.

⁴ See also the Trade Union Act Amendment Act, 1876 (39 and 40 Vict C 22) and the Trade Union Act of 1913 (2 and 3 Geo. V. C. 30).

⁵ (1847) 5 Cox. Cr. Cas. 495.

apprehended the law laid down in the statute.¹ "If any illegal means be taken, the principle of the common law steps in and says that if persons conspire and combine together to effect the illegal object, an object that is of itself illegal, any such conspiracy to effect an illegal object is itself criminal; and what the prosecutors of this indictment have done is this. They have not proceeded under the statute to indict the parties for the alleged illegal act, but they undertake to show a general combination amongst them all to effect these illegal acts, and for that it is they have indicated them." In *Reg v. Duffield*² a committee put forward a threat that unless a certain employee was discharged every man in the factory would be called out. It was held that it was perfectly legitimate for a workman not to take employment unless he was paid at a certain rate of wages. That being so, it was perfectly lawful for a body of workmen to combine and resolve not to accept employment unless the employers gave them wages at a certain rate. But it would not be lawful for a workman to persuade men already hired by and in the employ of other masters to leave that employment. Therefore, it follows that a combination of workmen formed for the purpose of persuading other workmen already employed to leave their employment, or any conspiracy to obstruct a manufacturer in carrying on his business by inducing his workmen to leave service or to make an alteration in the mode of conducting and carrying on trade, is an indictable offence. In *Reg. v. Rowlands*,³ the combination was one of employers. Eighteen cotton spinners signed a bond whereby they bound themselves severally to carry on their business according to the resolutions of the majority, the object of the combination avowedly being to counteract certain combinations of workmen, whereby "persons otherwise willing to be employed are deterred by a reasonable fear of social persecution and other injuries, from hiring themselves." The question was whether this bond was unlawful or merely unenforceable. The case was argued before three judges and there was great difference of opinion on the subject. The fol-

¹ 6 Geo. IV. Ch. 129.

² 5 Cox. Cr. C. 404.

³ 5 Cox. Cr. C. 436.

lowing extract from the charge to the jury by Erle, J., will show clearly how the court apprehended the right of the workmen and the employers to combine and the limits of that right: "The law is clear that workmen have a right to combine for their own protection and to obtain such wages as they choose to agree to demand. I say nothing at present as to the legality of other persons, not workmen, combining with them to assist in that purpose. As far as I know there is no objection in point of law to it and it is not necessary to go into the matter, but I consider the law to be clear so far only as while the purpose of the combination is to obtain a benefit for the parties who combine—a benefit which by law they can claim. I make that remark because a combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured; and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another.

"The rights of workmen are conceded; but the exercise of free will and freedom of action within the limits of the law, is also secured equally to the masters. 'The intention of the law is at present to allow either of them to follow the dictates of their own will with respect to their own actions and their own property; and either I believe has a right to study to promote his own advantage or to combine with others to promote their mutual advantage.'" The statement of the law by Lord Cockburn in *Walsby v. Anley*¹ should also be carefully studied. It puts the whole position in a nutshell. "I am decidedly of opinion" says he, "that every workman who is in the service of an employer, and is not bound by agreement to the contrary, is entitled to the free and unfettered exercise of his own discretion as to whether he will or will not continue in that service in conjunction with any other person or persons who may be obnoxious to him. More than this; any number of workmen who agree in considering some of their fellow workmen obnoxious, have each a perfect right to put their employer

¹ 3 E. and E. (Q.B.) 515; s. c. 121 Eng. Rep. 536.

the alternative of either retaining their services by discharging the obnoxious persons, or losing those services by retaining those persons in his employment. But if they go further, and, not content with simply putting the alternative to the employer, combine to coerce him, by threats of jointly doing something which is likely to operate to his injury, into discharging the obnoxious persons, I think that they may properly be said to bring themselves within the scope of the third section of the statute. In the case before us, it was not one man merely who went to the employer and said that he should leave if the obnoxious workmen did not, nor several men merely, who, adopting the same course, gave their master the option of retaining them or the obnoxious men in his service; but several men, who combined together with the object of coercing the master into dismissing the obnoxious workmen by the threat of otherwise leaving in a body at a moment's notice. Although I at first entertained some slight doubt whether what was said amounted to a 'threat,' I have no doubt whatever that the conduct of the appellant and the other malcontent workmen amounted to a 'molesting' of the master, within the meaning of the Act: and that their proceedings were altogether illegal, whether it is said that they threatened and intimidated, or that they molested and obstructed the respondent, their employer, in his business."¹

The above cases bear on the question of criminal liability for conspiracy. Turning to the question of civil liability for unlawful acts constituting conspiracy, we come across a number of momentous decisions in the course of the last and the present century. In order that the conspiracy might be declared unlawful it was found necessary to inquire in the first instance whether the act committed would have been unlawful if committed by an individual and not jointly with others. The law on the subject was laid down thus by Crompton, J., in *Lumley v. Gye*,² "A person who wrongfully and maliciously,³ or, which is the

¹ See also *Collins v. Locke* L.R. 4 A.C. 674; 48 L.J. P.C. 68, 41 L.T. (N.S.) 292; *Hornby v. Close* L.R. 2 Q.B. 153; *Farrer v. Close* L.R. 4 Q.B. 602.

² 1853 2 E. and B. 216 at p. 224, 22 L.J. Q.B. 463; s.c. 118 Eng. Rep. 749.

³ Although the principle is stated as applying only against a person who acts maliciously, the only 'malice' necessary to render him liable consists merely of the knowledge that the contract exists and that he has no

same thing, with notice, interrupt the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring and keeping him as servant after he has quitted it and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law." In that case the plaintiff a manager of a theatre sued the defendant, a rival manager for inducing a third party Miss Wagner, to break an engagement to sing at the plaintiff's theatre. It was held that the plaintiff was entitled to recover. He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that, whether he procures an actionable wrong or a breach of contract.¹

The principle laid down in *Lumley v. Gye* was confirmed by the Court of Appeal in *Bowen v. Hall*,²—though in that case too the decision was not unanimous—and ultimately received the approval of the House of Lords in *Quinn v. Leathem*.³ The whole law on this subject is to be found in these decisions as well as in the decision in *Allen v. Flood*.⁴ The principles may be briefly indicated as follows:—

An Act which is in itself lawful cannot be converted into an unlawful act so as to render the doer of the act liable to a civil action merely because it is done with a bad motive. The facts in *Allen v. Flood* were these: The Glengall Iron Co. employed the plaintiffs, who were not members of the trades union, by the day. The defendants (who were union men) informed the Glengall Iron Co. of the determination of their union men to leave the service of that Co. unless the plaintiffs, non-union men, were discharged; and by that means procured the Glengall Iron Co. to refuse at the end of a certain day to employ the plaintiffs, the refusal not being a breach of contract or other legal duty by the company. The employment

adequate justification for procuring a breach of it. The term 'malice' appears to be used in this connection in one of its weakest senses. See Bigelow on Torts, also Kenny's cases, p. 523.

¹ *Per* Erle, J., in *Lumley v. Gye* 2 E. and B. 216 at p. 233; s.c. 118 Eng. Rep. 749. Note, however, that Coleridge, J., delivered an elaborate dissentient opinion.

² L.R. 6 Q.B.D. 333.

³ L.R. 1901 A.C. 495.

⁴ (1898) A.C. 1.

would have continued but for what the defendants did, and the plaintiff suffered damage. It was held that the defendants were not liable whatever might have been their motive. They had a legal right to procure the Glengall Iron Company in the way they did, and not by use of any wrongful means, to refuse to renew the employment of the plaintiffs, and malice on their (the defendants') part towards the plaintiffs could not convert that right into a legal wrong. "A man has the legal right to say what he pleases, to induce, to advise, to exhort, to command, provided he does not slander or deceive or commit any other of the wrongs known to the law of which speech may be the medium."¹

Acts which are done by *A* and *B* who are acting in concert, solely with the lawful object of preserving and developing their trade and increasing their profits, and which do not necessitate the employment of any means in themselves unlawful, are not actionable even though these acts cause damage to *C* (*Moghul Steamship Co. v. McGregor Gow, & Co.*)² The facts in that case were these: Both the plaintiffs and defendants were shipowners engaged in the tea-carrying trade. The defendants had offered a special discount to those exporters who employed them alone and had organized a conspiracy for underbidding the plaintiffs, even by accepting unremunerative rates of freight. It was held by the House of Lords, affirming the decision of the Court of Appeal that the plaintiffs had no cause of action. For the right of competition exists even when it is conducted by means so unusual as to render it unfair, at any rate if the ultimate motive is that of benefiting oneself and not that of injuring the rival.

In *Quinn v. Leatham* the defendants were officers of a trade-union of butchers. The members of the union adopted a rule that they would not work with non-union men, or cut up meat coming from a place where non-union men were employed. The plaintiff was a butcher, not a member of the union, and had men in his employ who were not union men. By

¹ *Allen v. Flood* (1898) A.C. 1 *per* Lord Herschell at p. 138.

² (1889) 23 Q.B.D. 598; (1892) A.C. 25.

invitation of the secretary of the union he attended a meeting of the union, the defendants also being present, and offered to pay whatever was required to enable his men to become members of the union; but the offer was rejected and a vote passed to call out the plaintiff's men. A threat was also held out, and afterwards carried into effect, to call out the men of a customer of the plaintiff who supplied the plaintiff with meat; the result being that though the customer wished to continue to supply the plaintiff he stopped doing so. "Black Lists" were also circulated throughout the plaintiff's neighbourhood by several of the defendants holding up to odium the plaintiff and those who dealt with him. The plaintiff suffered damage from all this. It was held that the defendants were liable. "The defendants were doing a great deal more than exercising their own rights; they were dictating to the plaintiff and his customers and servants what they were to do. The defendants were violating their duty to the plaintiff and his customers and servants, which was to leave them in the undisturbed enjoyment of their liberty of action.¹ It has also been held² that the violation of a legal right committed knowingly is a cause of action and it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for interference.

A combination of *A* and *B*, to do damage to *C*, in his trade and by means of coercion or intimidation to induce *C*'s customers or servants against their will to break their contract with him, or not to deal with him, or not to continue in his employment, is actionable provided it causes damage to *C*.

If the inducing is done by a combination of many persons a continuous manifestation of ill-will by them, even when it involves no fear of physical violence (e.g. mere boycotting), may become an annoyance so serious as to constitute an unlawful means of inducement.'

¹ *Quinn v. Leatham* (1901) A.C. 495. *per* Lord Lindley at p. 537.

² *Glamorganshire Coal Co., Ltd. v. South Wales Miners' Federation* L.R. (1903) 2 K.B. 545. See also *Lumley v. Gye* and *Bowen v. Hall* (*supra*).

³ *Gegelahn v. Guntner and others* 167 Mass 92. *Gregory v. Duke of Brunswick and H. W. Vallance* 1 C. and K. 24.

I have endeavoured to give a brief survey of the law as to civil liability in regard to conspiracies by a reference to the leading cases only. There are numerous other cases¹ in which trade-union disputes in some shape or form came up for disposal in connection with allegations of conspiracy or combination. It is scarcely possible within the scope of this lecture to deal with the details of all these cases. One point, however, should be noted that the effect of such cases as *Quinn v. Leathem* is a great deal counteracted and cut down by the Trade Disputes Act, 1906.² In addition to providing (sec. 4) that no action for a tort of any kind shall lie against a trade union so as to charge the union funds, the Act provides (sec. 3) that "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills." The expression 'trade dispute' means (sec. 5, sub-sec. 3) any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment or with the conditions of labour of any person, and the expression 'workmen' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises. The change introduced by the Trade Disputes Act of 1906, therefore, is that it is now no longer necessary to examine the motive with which the Act is committed provided that it is done "in contemplation and furtherance of a trade dispute," and the means adopted are not unlawful. This has been very clearly explained by Lord Loreburn, L.C., in *Conway v. Wade*. "It is necessary" he observes, "to consider how the

¹ See for instance *A. G. of Australia v. Adelaide Steamship Co.* (1909) L.T. 258 P.C., *South Wales Miners' Federation v. Glamorgan Coal Co Ltd.* (1905) A.C. 239; *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland* (1903) 2 K.B. 600 C. A., *Smithies v. National Association of Operative Plasterers* (1909) 1 K.B. 310 C.A., *Denaby and Cadeby Main Collieries Ltd. v. Yorkshire Miners Association* (1905) A.C. 384.

² 6 Ed VII C. 47.

law stood before 1906 If inducement was accompanied by violence or threat (always remembering that a warning is one thing and a threat is another) there was a good ground of action. I next suppose there was no violence and no threat, and yet the inducement involved a breach of contract. There also it was established, after a long controversy beginning with *Lumley v. Gye* in 1853, that an action could be maintained, unless at all events some sufficient justification could be made good." His Lordship then quotes section 3 of the Trade Disputes Act of 1906 and goes on to say "Let me see how this alters the pre-existing law. It is clear that if there be threats or violence, this section gives no protection, for there is some ground of action besides the ground that 'it induces some person to break a contract,' and so forth. So far there is no change. If the inducement be to break a contract without threat or violence, then this is no longer actionable, provided always that it was done 'in contemplation or furtherance of trade dispute' . . .

. . . In this respect there is a change. If there be no threat or violence, and no breach of contract, and yet there is 'an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills,' there again there is perhaps a change. It is not to be actionable, provided it was done 'in contemplation or furtherance of a trade dispute.' So there is no longer any question in such cases, whether there was 'sufficient justification' or not. The condition contained in these words as to trade dispute is made sufficient."¹

The law on this branch of the subject of monopolies has not developed in India owing to the fact that trade unions hardly exist in the country and cases of conflict between workmen and employers through the operations of trade-union rules, or otherwise, are practically unknown. A trade-union has been defined as "A combination of workmen of the same trade or of several allied trades for the purpose of securing to each member by united action the conditions most favourable for labour, an association of

¹ (1909) A.C. 506 at pp. 510, 511 and 512.

workmen formed principally for the purposes of regulating the prices and the hours of labour and, in many cases, the number of men engaged by an employer, the number of apprentices which may be found in proportion to the journeymen employed by a master and the like. As accessories these unions may collect funds for benefit societies, insurance of tools, libraries, and reading rooms, but their fund to which every member must regularly contribute a stated sum, is principally reserved for enabling the men to resist by strikes and otherwise such action on the part of the employers as would tend to lower the rate of wages or lengthen the hours of labour.”¹

From the vocabulary of trade-unions, several words have become current in ordinary language. Some only of these such as the words Boycott, Picketing, Strike, etc., have become familiar in this country. But few, if any, cases of importance on the subject have been decided by the courts here.² And those that have come to the notice of the court hardly turn on any consideration of the principles of boycott or picketting. It is useful, however, in view of the questions that underlie these terms to state in brief what constitutes the acts represented by them. ‘Boycotting’ has been defined as follows: “A combination between persons to suspend or discontinue dealings or patronage, with another person or persons because of refusal to comply with a request made of him or them. The purpose is to constrain acquiescence or to force submission on the part of the individual who by non-compliance with the demand has rendered himself obnoxious to the immediate parties, and perhaps to their personal and fraternal associates. The persons directly so confederating have hitherto as a class been employees as against either their own employer or the employer of others in a like business or else of retail dealers as against a particular manufacturer or wholesale dealer. The means employed have been the withdrawal of custom and good-will in business of the immediate parties and of such others as they could influence. The word

¹ Webster's Universal Dict.

² See for instance *Raskumar v. Emperor* 11 C.W.N. 28. The decision, however, in these cases hardly rest on the question of boycott or picketting, as such. The significance of these cases is more political than legal.

may refer to the fact of combining or to the resolution as executed. The practice takes its name from one Boycott, an agent for Lord Erne on certain estates in the western part of Ireland. Having lost favour with the tenant from evictions and other harsh treatment they agreed not to work for him, and the tradesmen of the community not to deal with him.¹

A strike is briefly defined as "a simultaneous cessation of work on the part of the workmen, and its legality or illegality must depend on the means by which it is enforced and on its objects." Another definition is this: A strike is a combination among labourers, those employed by others, to compel an increase of wages, a change in the hours of labour, some change in the mode or manner of conducting the business of the principal, or to enforce some particular policy in the character or number of the men employed or the like."

There is a distinction between strikes and boycotts. The latter though unaccompanied by violence or intimidation have been generally pronounced as unlawful by the courts of the United States and of England. Strikes, however, are not necessarily unlawful, the right of employees to combine and peaceably to leave the employ of their employer because any of the terms of their employment are unsatisfactory being generally recognized.²

'Picketting' is derived from the word 'picket.' 'Picket' means a body of men belonging to a trade-union sent to watch and annoy men working in a shop not belonging to the Union, or against which a strike is in progress.' Picketting may, however, mean simply the stationing of men for observation. If their duty ends there and, in so watching and observing the doings of others, they do not cause any physical annoyance or molestation to any one, it can hardly be said that such an act is in itself unlawful. But when men are stationed for exercising threat, coercion, or intimidation and when they endeavour by force to make others desist from going to the picketted place to do business or work or to seek work therein or in

¹ Anderson's 'Dict. of Law.'

² See Joyce on Monopolies, pp 51-2

³ Century Dictionary.

some other way to hamper, hinder or harass the free despatch of business by the employer, such conduct on their part clearly becomes unlawful.¹

¹ *Mills v. United States Printing Co.* 91 N Y supp 185, 99 App. Div. 605—quoted in Joyce on Monopolies.

LECTURE XI.

CAPITALISTIC MONOPOLIES.

Trusts and combinations.

"Any sort of capitalistic combination," says the great legal historian of modern times ¹ is popularly called a 'Trust,' if only it is powerful enough." This is putting the thing in the proverbial nutshell, and is only possible by presupposing in the reader a fairly wide acquaintance with the different varieties of monopolistic combination. Indeed, combinations appear in such protean varieties that it is essential, first, to study their characteristics and the conditions of their growth, before we can take it upon ourselves to criticise their merits and demerits, or the law and legislation applicable to them. A detailed account of their origin, growth and present position is obviously beyond the scope of these lectures. The United States have been properly called the native home of Trusts and monopolistic combinations. In Germany, Austria and some other parts of the Continent, combinations of a sort have flourished, but they have assumed more or less a particular form, with its own characteristics, which are conveyed by the generic term *Kartell* applied to them all. In England Trusts, in the strict American sense, are not prominent for reasons which I shall indicate later on. Concentration of capital in large businesses and combination of businesses for purposes of economy and efficiency do exist. But these facts do not necessarily imply monopoly in the odious sense connoted by the word Trust in the legal phraseology of the United States.

To begin with, one has to dismiss from one's mind the old signification of the word Trust. A Trust, as ordinarily understood, is a respectable institution, and imports an arrangement by which property is handed to or vested in a person in the trust or confidence that he will use or dispose of it for

¹ Prof. F. W. Maitland. See 'Collected Papers,' Vol. III, Article, 'Trust and Corporation.'

the benefit of another. A Trust, as understood in the special sense in the United States, has an evil savour about it, and, as will appear presently, is associated with the ideas of fraud, oppression and illegality, of unholy alliance with railways, of the stifling of competition and starving of industries, of colossal profits and iniquitous self-aggrandisement on the part of Trust magnates. Public feeling has run very high at times against these industrial mammoths, and Committees of Investigation have been appointed times without number to inquire into the *modus operandi* of Trusts with the result that they have been characterised by many opprobrious epithets. Law and legislation have also strenuously endeavoured to strangle the giants which the industrial conditions of the country have brought into being. Nevertheless, they continue in unabated vigour. This leads us to consider the conditions which favour the growth of Trusts. And, first, as to monopolistic combinations in general.

One of the prime requisites is the concentration of raw material within a defined area, such as would afford opportunities to a firm to establish complete control over the area in question and exclude new competitors from interfering with the operations. Iron ores in the Lake Superior region, oil ores in Pennsylvania,¹ diamond ores in the Transvaal and potash in Germany are illustrations of the great possibilities for a monopolistic formation in the region where nature offers her bounties in the shape of concentrated raw materials. Specially, where the particular raw material in question is only found in one country, or where, although available elsewhere the expense of procuring it becomes prohibitive owing to freight or other charges, foreign competition is shut out and the monopoly is established on a secure footing. This leads us to the next condition, viz. absence of foreign competition. It may arise from natural advantages such as those abovementioned, or from artificial manipulation such as by means of a protective tariff. This is why it has been said that

Conditions favouring the growth of combinations.

Concentration of raw material within a defined area.

Absence of foreign competition

Protective tariff.

¹ The Feudatory State of Mayurbhanj and Burma present analogous cases in India in regard to iron and oil respectively.

‘Tariff is the mother of Trusts.’¹ Under this head comes also another potent circumstance which has been the making of many a monopoly—I refer to secret preferential rates of freight and other discriminations which, together with the subject of tariff, will engage our attention later on. The notorious case of the Standard Oil Company is an instance of what protective tariff and preferential rates of freight can achieve. Another powerful factor in the growth and development of monopolies consists in the character and working of the business itself and may, therefore, be called ‘internal.’ Thus the trade may be one in which each separate firm requires a large amount of fixed capital, and the expenses of production are heavy. Under such circumstances, new rivals are not likely to appear, and there is a tendency on the part of the long-established big firms to come to an agreement and join hands with the new, for purposes of regulation of output and prices and securing efficiency and economy. In some cases, again, the success of a monopoly has depended upon yet another condition and that is, the possession of specially effective patents, for example, in the case of Mr. Carnegie in the iron and steel trade and of Mr. Havemeyer in sugar-refining.²

In considering the course which the development of monopolies has taken in America and the characteristic forms they have assumed there, it is necessary to study, in addition to the causes abovementioned, the peculiar social and industrial conditions of that country. There were forces at work in the United States, which were absent in any other part of the world, and it is hardly too much to say that the social and temperamental conditions of the people formed the main nucleus of these forces. Consider for a moment the effect of immigration. Never before in the history of the world has immigration played such a conspicuous part in shaping the destinies of a country as in America. Who ever could have thought that the refuge of the Pilgrim Fathers would become the veri-

Preferential rates
of freight

Internal advan-
tages

Social and
temperamental
conditions
favourable to
growth of
monopolies
in America.

¹ Mr. Havemeyer.

² So also in the case of the Cotton-seed Oil Trust the success was largely based upon the ownership of a patent process for cleaning cotton-seed preparatory to crushing.

table Vulcan's workshop for all the world, or that the refugees from intolerant states in Europe would within a short space of time develop into a nation of intrepid organisers, fortune-builders and nation-builders, such as the world had never seen? Yet so it has been. After the year 1840, there was a regular stream of immigration from different parts of Europe to America. The devastating famine in Ireland, the oppression of reactionary Governments in Europe, the dearth of openings for talent in other countries of the West,—all these contributed to the great consummation, and bands of intrepid workers and ardent spirits betook themselves to the continent across the Atlantic full of enthusiasm and faith for the future. The result was an obvious accession of strength and working power. In 1800 the population of the United States was only five millions. In the year 1860 it was over thirty-one millions. These ardent spirits threw themselves into a life of strenuous activity which began from the establishment of Independence, and steadily went on expanding thereafter. The population going up apace at an enormous rate gradually pressed inland till they penetrated across the Continent to California. "Before 1860 twenty new States were added to the Union of the thirteen 'original' States. From 1830 to 1860 the marvellous railway development (twenty-three miles in 1830, and thirty thousand miles in 1860) gave fresh impetus to this expansion. Only a few years were required to transform frontier forts into huge cities, and riverside hamlets into flourishing manufacturing towns. The pioneers noted and adopted every new and labour-saving invention, specially the machines which were then beginning to revolutionise agriculture, and the States soon took their place among the great wheat-growing countries of the world."¹ Then followed the Anti-slave War (1861-1865) and during the period of the war and after, marked changes took place in the conditions of production. Railway extensions became absolutely imperative for the purposes of the war, and it was found expedient to offer every inducement to railroad corporations to start upon new ven-

¹ 'The Story of Trusts' by M. E. Hirst, p. 55.

tures. To the Union Pacific, for instance, and to the Northern Pacific exceptionally generous grants in lands and money were made for encouraging extensions. Improvements in transport made rapid strides. The tariff too was raised to an average of nearly fifty per cent., thereby preventing import of raw materials or finished products from foreign countries and favouring articles of home manufacture. Add to all this the discoveries of phenomenal quantities of rich ores within defined areas, such as gold in California, iron near the Lake Superior, anthracite coal in Pennsylvania petroleum in Ohio, and other mineral ores of various descriptions. With the growth of large cities there was a parallel growth of large industrial centres, created and fashioned by a class of shrewed financiers and business-organisers or 'Undertakers,' the like of whom the old world had not seen. Obviously, the rise of this class of individuals was as much an effect of the peculiar social and economic causes at work, as the rise of the industries themselves. To the careful student of American economic history the 'Railroad King' or the 'Oil Dictator' does not appear as accidents, but as part of the natural evolution of American genius acting and reacting on the environment of the times in which they have lived. It was just the psychological moment for money making and fortune building, for industrial and financial monopoly. A vast and ever increasing population, an almost inexhaustible store of minerals and other raw materials, an indulgent legislature ready to offer unlimited protection by means of tariffs, on the one hand, and bounties on the other, an ever-expanding system of transport by sea and land, an eager and sagacious band of business engineers and *entrepreneurs*—what more could one ask for? Never in history were the economic conditions more favourable to "stupendous production and colossal profits." Thus the era came to be marked by large accumulations of fortune in the hands of a few individuals gifted with the requisite training and business instinct.¹ But if the

¹ Cf. the following "All over the country there is a peculiar tendency to generalise and to jump at far-reaching conclusions It is the necessary counter-part to the American spirit of specialisation and adaptability to given circumstances. Therefore, the general belief was that the true public-

root cause of monopolies in America is to be found in the social, economic and industrial evolution, briefly indicated above, it is also to be found in the temperament and character of the people. The mental constitution of the American is intensely individualistic. True to the traditions of the Anglo-Saxon race, and true to the memory of his Puritan and revolutionary ancestors, the American means to carve out his career for himself free from interference, or control, from without. In industry as much as in everything else, he follows the principle of *laissez faire* and demands that the business man or the industrial magnate, whoever it may be, shall be "let alone" so that he may shape his shop and make his money as best he chooses. It follows that in law and legislation the same principle must prevail. And so it did, to begin with. The constitution of the United States was drawn up under the influence of the physiocratic doctrine of natural rights and the principle of *laissez faire*. Anything tending to curb or cripple the equal personal right of every citizen, or to interfere with the free transaction of lawful private business was therefore prohibited as being 'against public policy.' The first rulers of the United States were saturated with this idea and the institutions which they shaped and moulded bear its stamp to this day. "A belief in the blessings of a minimum of government," says Ernst von Halle, "and a disinclination for the interference of society with the sphere of the individual, was more widely diffused than any other country. To forbid as little as possible and to regard what was not forbidden as silently permitted, to consider a right once granted as irrevocable, these were the principles on which public opinion was built. The device of free competition partook, in the eyes of the people, of the character of an eternal holy truth, remote from the influence of time and economic conditions. Whoever disregarded it was *eo ipso* wrong; his actions were 'against public policy.'"¹

welfare depends upon a continuous increase of production and upon a utilisation of all natural resources to the utmost of technical possibility." Ernst von Halle's 'Trusts or Industrial Combinations and Coalitions in the United States,' pp. 4-5.

¹ Ernst von Halle's 'Trusts or Industrial Combinations and Coalitions in the United States,' pp. 2-3.

Thus it came about that, with the appearance of monopolies and 'Trusts' in America, there arose a strong feeling that they were contrary to the accepted ideal of equal personal rights for every one. The common law of England and the statute law of the eighteenth century abhorred monopolies of every description. Any agreement to control or restrict the production and sale of goods, or to enhance prices, was against the spirit of the law. A similar principle governed the American Constitution and the American rulings. Later, however, a difference grew up between the English and the American views. In 1844¹ Parliament definitely abolished all restrictions upon forestalling, enhancing, regrating and engrossing, thereby recognising the altered industrial conditions of society. Looking to case law too, it appears that the English courts of justice have revised their views in the light of the palpable change which has come over industrial conditions and taken up a comparatively lenient attitude towards combinations. As regards an agreement between rivals not to run in opposition to each other, but rather to effect combinations for the purpose of securing greater efficiency, greater economy, or, in any event, greater chances of survival in the struggle for existence, the attitude of English decisions can hardly be said to be one of condemnation. A few rulings may serve as illustrations:

In England.

In *Hearn v. Griffin*² an agreement between two rival coach proprietors not to run in opposition to each other, and to charge the same prices was sustained by the King's Bench against the objection that it was void as "in restraint of that competition in trade which is so conducive to the interest of the public." Lord Ellenborough observed: "This is merely a convenient mode of arranging two concerns which might otherwise ruin each other." In *Wickens v. Evans*,³ an agreement among three persons, rivals in the business of selling trunks and boxes in different parts of England, entered into in view of the inconvenience and loss resulting from rivalry, and whereby each should have the right of doing business in certain

¹ 7 and 8 Vict. C. 24.

² 2 Chitty 407 (1815).

³ 3 Younge and J. 318 (1829).

districts to the exclusion of the others was held not illegal as 'in restraint of trade.' In *Shrewsbury and Birmingham Ry. Co v. L. and N. W. Ry. Co.*¹ an agreement between two railway companies tending to prevent competitions was held not unlawful. The case of *Hare v. L. and N. W. Rly. Co.*² took the matter a little further and held that agreement among competing railroad companies for a division of profits, in certain fixed proportions, was not illegal as preventing competition, in the absence of statutory provisions; the court observing, "it is a mistaken notion that the public is benefited by putting two railway companies against each other till one is ruined, the result being at last to raise the fares to the highest possible standard." In *Collins v. Locke* an agreement among four individuals and firms carrying on the business of stevedores in the port of Melbourne, for parcelling out the stevedoring business, and preventing competition, at least among themselves, "and it may be to keep up the price," was held not unlawful as in restraint of trade, if carried into effect by proper means.⁴

In the United States the tendency of the legisla- In the United States.
 ture as well as of the courts of justice has been different. In the name of *laissez faire*, they upheld the stringent restrictions of the common law and the statutes of England of the days of the Pilgrim Fathers, not perceiving that in doing so under modern conditions they themselves violated the principles of *laissez faire*. For had not the combinations or corporations an equal right to be 'let alone'? Numerous enactments were passed in every State for the purpose of checking monopolies which had the effect of defeating or lessening competition, raising prices and so forth.⁵

As in legislature, so in the rulings of the courts the endeavour throughout seemed to be to put new wine

¹ 16 Jurist, 311 (1851).

² 2 Johnston and Hemming, 81, 103. Note however the case of *Moghu! Steamship Co v. McGregor Gow and others* (1892) A.C. 25, which is not in point on this branch of our subject

³ (1879) 4 A. C. 674.

⁴ It was pointed out in *U S v Addyston Pipe and Steel Co.* 84 Fed. 271, 285, 29 C.C.A. 141, 154; 46 L. R. A. 122. 132 (6th C. 1898) that this decision is at variance with many in America. (See *post*).

⁵ The following from the constitution of Georgia, which was the first provision in this direction will serve as an illustration: "The general assembly shall have no power to authorise any corporation to make any contract or agreement whatever with any other corporations which may have

into old bottles, to regulate new world conditions by old world methods and principles. It was laid down, that "a monopoly in the modern sense is created when, as a result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power to practically control the prices of commodities and thus to practically suppress competition.¹ Again "any combination the tendency of which is to prevent competition in its broad and general sense, and to control, and thus at will enhance prices, to the detriment of the public, is a legal monopoly."²

We find, however, a broader and more rational view taken in other cases, specially some later decisions,—the view, namely, that although a monopoly may deprive the community of the 'benefit' of free competition and place the control of production in the hands of a few, still it does not follow necessarily that "every contract or combination which in any degree tends to restrict competition is illegal. So strict a rule would invalidate innumerable ordinary business transactions, which are unobjectionable and necessary in order that business shall not completely stagnate." This view, it may be observed, is in agreement with that taken by Lord Chief Justice Coleridge in the famous case of *Moghul Steamship Co. v. McGregor*.⁴ The following extract from his luminous judgment puts the whole principle in a nut-shell: "It must be remembered that all trade is and must be, in a sense, selfish trade not being infinite, nay, the trade of a particular place or district being possibly very limited what one man gains another loses. In the hand to hand war of commerce, as in the conflicts of public life, whether at the Bar, in Parliament, in

the effect, or be intended to have the effect, to defeat or lessen competition in their respective business, or to encourage monopoly; and all such contract or agreement shall be illegal or void"—Ernst von Halle's 'Trusts or Industrial Combinations in the United States,' p. 17.

¹ *U.S. v. American Tobacco Co.* 164 Feb 700, 721 (C C N Y. 1908). See numerous cases cited there.

² *People v. North River Sugar Refining Co.* 54 Hun 355, 377; 3 N.Y. Suppl. 401, 413; 2 L.R.A. 33, 42 (1889).

³ *State v. Duluth Board of Trade* 107 Minn. 506, 544; 121 N.W. 395. See also *United States Chemical Co., v. Provident Chemical Co.* 64 Fed. 946, 950.

⁴ L.R. 21. Q.B.D. 552, 553.

medicine, in engineering (I give examples only) men fight on without much thought of others, except a desire to excel or defeat them. Very lofty minds like Sir Philip Sydney with his cup of water, will not stoop to take an advantage, if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Sir Philip Sydneys; but these are counsels of perfection which it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business. * * * * It follows that they may, if they think fit, endeavour to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of the profitable offers." Here we have an eloquent application of the principle of *laissez faire* in favour of combinations within reasonable limits, although it may tend to be antagonistic to free competition.

A similar view has been taken of late in other American cases. Thus it is said, "Not all combinations are condemned, and self-preservation may justify prevention of undue and ruinous competition, when the prevention is sought by fair and legal methods." ¹ As regards competition being the 'life of trade,' the principle has been considerably whittled down, till we find judges vigorously attacking it as a fruitful source of mischief in practical economics and legislation. In the case of *Kellogg v. Larkin* ² the court thus expressed itself; "I apprehend it is not true that competition is the life of trade. On the contrary, that maxim is one of the least reliable of the host that may be picked up in every market-place. It is in fact the shibboleth of mere gambling speculation, and is hardly entitled to take rank as an axiom in the jurisprudence of this country. I believe universal observation will attest that for the last quarter of a century, competition in trade has caused more individual distress, if not more public injury, than the want of competition.

¹ *U.S. Vinegar Co. v. Fochranbach* 148 N.Y. 58, 64. See also *Oakdale Manuf. Co. v. Garst* 18 R.I. 484; 28 Atl. 973; 23 L.R.A. 639; 49 Am. St. Ref. 784: "It does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is, therefore, illegal. Such a rule would produce greater public injury than that which it would seek to cure."

² 3 Pinney (Wis), 125, 150; 56 Am. Dec. 164, 180 (1851).

Indeed, by reducing prices below or raising them above, values (as the nature of the case prompted) competition has done more to monopolise trade, or to secure exclusive advantages in it, than has been done by contract."¹

The current of
decisions not
uniform.

It will appear from the above that the current of legal decisions has not been uniform. Now one principle, and now the other has formed the basis for the courts to proceed upon. The authorities against combination generally proceed to lay down that combination of capital may fulfil the following objects: (a) to control competition, (b) to control prices, and (c) to control production. But it is worth considering whether a combination must be pronounced illegal because it is capable of doing any of the things above mentioned. It would, indeed, be a dangerous doctrine to lay down that a combination must be condemned because of its supposed tendencies or possibilities.² Whether an association or combination does as a matter of fact stifle competition is a matter of evidence. But it would hardly be sound to say that the position of a combination being such as to render it possible for it to do what is unlawful, or contrary to public policy, it must necessarily be condemned as unlawful. If that were the ground—and in many decisions it is difficult to discover any other—it would be equally justifiable to condemn a law-abiding citizen as a criminal because from his environment and other conditions it appears to be possible for him to commit offences. As Mr. Eddy observes: "the larger a partnership and the more powerful a corporation becomes, the greater the possibility of doing that which is injurious or oppressive; but individuals, partnerships and corporations are not condemned on account of any of their supposed tendencies. The law views actual conditions and results rather than possibilities, whether near or remote. There are few lines of decision more pernicious than those which

¹ This is in strange contrast with the oft-quoted statement in *Hooker v. Vandewater* 4 Denio (N.Y.) 349; "Competition is the life of trade. It follows that whatever destroys or even relaxes competition in trade is injurious, if not fatal, to it."

² Statutory provisions apart, of course; for a statute may lay down that the tendency or the possibility itself should be a sufficient test of illegality.

arbitrarily dispose of valuable property rights on account of alleged tendencies".¹ There is no presumption against the legality of a combination. On the contrary a combination should be presumed legal, until the contrary is shown by affirmative evidence. Where, however, it affirmatively appears that an actual monopoly has been created by the agreement of combination, the presumption of law may fairly be indulged in. "Where they include all those engaged in any business in a large city or district, are unlimited in duration, and are manifestly intended, by the surrender of individual discretion, by the arbitrary fixing of prices, or by any of the methods to which the hope of gain makes human ingenuity so fruitful, to strangle competition outright and breed monopolies, the law, while it may not punish, will not enforce them."²

After the above brief sketch of the tendency of law and legislation regarding combinations in the United States it is time for us now to consider the different forms of combinations which they are designed to combat. They naturally fall into three main classes :—

Different forms of combination in the United States.

- (1) Simple Combinations.
- (2) Trusts.
- (3) Corporate Combinations.

I. *Simple Combinations.*

This comprehends an extensive class of combinations of varying degrees of integration. As distinguished from (2) and (3) it is characterised by loose formations consisting of different firms and businesses, for some specific, sometimes a temporary, purpose only. In the words of von Halle, they are "more or less amorphous."³ Take, for instance associations of men in the same line of business whose interests are identical, associations formed for protecting their interests, safeguarding their common rights or otherwise promoting their general welfare.

Simple combination.

¹ Arthur J. Eddy's, *Law of Combinations*, Vol. I, p. 467.

² *Hoffman et al v Brooks et al* (1884) 11 Wkly. Law Bul. 258. See also *Salt Co. v. Guthrie* (1880) 35 Ohio St. 666.

³ This classification is taken from Eddy's, *Law of Combinations*.

⁴ von Halle's *'Trusts or Industrial Combinations and Coalitions in the United States'*, p. 19.

The "Brewer's National Convention" is an instance. It merely represents a mode of co-operation for the purpose, as they feel, of fighting the good fight against temperance preachers and temperance legislation, or of protesting against unfavourable taxation. So also are the "Butchers' National Protective Association," "the Bankers' National Convention" and the like, all acting in co-operation in their own respective spheres for mutual help and protection. Apart from their negative propaganda, they sometimes have a positive programme of work in the shape of organising and maintaining relief funds for invalids as also life policies and pensions for widows and orphans, etc. It is evident that these associations do not affect the conditions of competition and from that point of view may be regarded as innocuous. The next step is reached when we come to associations for the purpose of regulating trade customs, listings and quotations or scales of prices. Thus an association of brewers, or milk wholesalers, or cattle and meat dealers is formed in Chicago or New York, and though only joined by a majority of the tradesmen in the particular trade succeeds in establishing the prices for the entire business. "They regulate the standard of quality of the articles dealt in, the admittance of securities to dealings and listings, the terms of payment, the forms of transaction, the methods of clearing; occasionally, they forbid certain practices."¹ A further step is reached when we come to associations which not only fix prices but regulate the output. Such regulation, however, is obviously not possible unless the firms entering into the agreement control a very large proportion of the output, and unless they take good care not to overstock the market. For this purpose it is usual in such associations to appoint common agents for marketing the product. The associations or combinations above mentioned come under the large genus denominated 'Pools.' A pool of its very nature is more or less short-lived and often collapses after exacting high prices for a few months. Loosely organised and temporary pools and associa-

Pools.

¹ See von Halle *Trusts or Industrial Combinations in the United States*, p. 23.

tions are prevalent in many trades in England and other countries not to speak of the United States where combinations of all shades and grades are found in abundance. At times they succeed in obtaining higher prices to begin with, but this success draws new competitors to the field and prices inevitably go down; at other times, the success is not up to expectation and the result is that the organisation relaxes its hold on the members and it gradually crumbles down. The most successful 'pools' have been in the transport trades. A closer and more lasting form of combination among a few firms controlling a large market is sometimes called a "Ring." This is most frequent in the collecting and distributing branches of trade.

Between the so-called 'amorphous' or loosely formed alliances, above described under the head of simple combinations, and the fully developed monopolies about to be dealt with under the head of Trusts and 'corporate combinations' there is an intermediate form. I refer to Kartells. It is a form of union greatly prevalent in Belgium, Austria, Germany and other parts of the Continent. A Kartell is a combination effected by the businesses or firms in question forming a Central Board or Syndicate consisting of their representatives, which fixes uniform prices and regulates the output, without interfering with the management of the individual firms. "The syndicate apportions to each its share of the output, pays for it at a fixed price, and markets the whole stock at prices which depend on market conditions. The profit is divided among members in proportion to their output, a bonus or compensation is given to any firm which has not produced the whole of its allotment and fines exacted from any which have exceeded. The bonus cannot exceed a certain maximum, so that no firm can enjoy a profitable leisure by closing down its works altogether. One essential feature of a Kartell is that it is a terminable association and must be renewed or dissolved at the end of a fixed period. Here, again, it differs from the permanently organised Trust."¹ Germany may be regarded as the home of

Kartells

¹ See M. E. Hirst's luminous little book 'The Story of Trusts' pp. 170-171.

Kartells, and there they dominate many trades, specially the coal trade, the iron and steel trades and the chemical trades.

Decisions as to
simple combina-
on

Before we pass on to the more thorough-going monopolies let us consider for a moment some of the earlier cases of simple combinations that came up before the American Courts. In *Stanton v. Allen*¹ there was a formidable association of boat-owners consisting of the members of all the transportation lines on the Erie and Oswego canals at the time. Its professed object was the establishment of fair and uniform rates of transport both as to freight and passengers, and to equalise the business among the members. The rates were to be determined by a committee. Each member bound himself not only to run all his present boats, according to the agreement and turn his earnings into the common stock at the rates agreed upon, but he was also prohibited, under severe penalties, from employing on any other terms boats subsequently acquired. Each member having thus thrown his concern into stock was to derive an income in proportion to the number of boats employed by him. It was held that such a combination was illegal. "Indeed the consequence of such a state of things would shortly be, that freighters and passengers would be ill-served, just in proportion as the carriers were well paid. The rule that contracts and agreements are void when contrary to public policy, when properly understood and applied, is one of the great preservative principles of a state. Sound morality is the corner-stone of the social edifice. Whatever, therefore, disturbs that is condemned under that fundamental rule."² In *India Bagging Association v. Kock* a number of commercial firms entered into an agreement not to sell any India cotton bagging for a specified time, except with the consent of a majority of the combination. It was held that such an agreement was void and could not be enforced. The court observed: "This is a case which ought never to have come before us. The agreement between the parties was palpably and unequivocally a combination in restraint of trade, and to enhance the price in the market of an

¹ (1848) 5 Denio 134 at 441.

² (1848) 5 Denio 434 at 147.

article of primary necessity to cotton planters. Such combinations are contrary to public order and cannot be enforced in a court of justice.”¹ In another case, *Nester et al v. Continental Brewing Co. et al*² forty-five firms engaged in the business of brewing in Philadelphia entered into a combination to regulate and control the price of beer within that city and adjoining territory. The combination was known as the Brewer’s Pool and included all the brewers in Philadelphia with the exception of one only. It was held that it was a combination in restraint of trade, tending to destroy competition and to create a monopoly in an article of daily consumption; and that the power which was given to the pool to arbitrarily fix the price necessarily controlled production, and was contrary to public policy. “An increased price put upon an article restricts its sale and the restricted sale necessarily reduces the production. It is no answer to say we do not restrict your production; you may produce any amount you like—we only restrain your sale of it. Is this not practically a limit to production? Where a pool or combination reserve the right to regulate prices, they can, by the manipulation of prices, drive their competitors out of business, create a monopoly and enhance at their pleasure the prices to consumers.” On appeal the Supreme Court of Pennsylvania observed, “The test question in every case like the present is, whether or not a contract in restraint of trade exists which is injurious to the public interest. If injurious, it is void as against public policy. Courts will not stop to inquire as to the degree of injury inflicted. It is enough to know that the natural tendency of such contracts is injurious.” The point of distinction between lawful and unlawful combinations is well indicated in the following dictum in *Texas Standard Oil Co. et al v. Adoue et al*:³ “If the object of the contract

¹ (1849) 14 La. Ann 164. Note, however, that the Supreme Court of Texas held that a combination of persons and firms in a city for the control of the sale of beer and the cessation of competition *inter se* is not void at common law as against public policy although in restraint of trade, since beer is not an article of prime necessity and its sale is closely restricted by public policy, but that the combination was contrary to the Texas Act of 1889, relating to conspiracies against trade *Anheuser-Busch Brewing Association v. Houch et al* (1894) 27 S.W.R. 692.

² (1894) 2 Dist. R. 177 s.c. on appeal 161 Pa. St. 473; 29 Atl. .R. 102.

³ (1892) 83 Tex 650, 19 S.W.R. 274.

had been merely to provide in good faith a uniformity of prices among the parties thereto, to avoid unhealthy fluctuations in the market, or if the contract had contemplated a joint and mutual association between the parties for their common benefit in the nature of a partnership and had simply fixed the prices at what they considered the business would bear, instead of a combination between independent manufacturers and dealers for the purpose of at least destroying all competition between themselves, then there might have been nothing in such an arrangement which the courts could pronounce as pernicious and forbidden by law. There is no pretence, however, that any partnership was contemplated in this instance; and if there had been, the entire absence of any community of interest in the profits, losses, or capital employed, would have effectually repelled the assumption. Each party retained, after the contract as before that time the control of his capital and the operation of his own mills and did not throw his capital or manufacturing concerns into a common stock. He continued to operate with his own separate means, but surrendered his right of competition and of supplying his mills with raw material at the best prices he might otherwise have obtained in the markets of the State and consented to submit to rates artificially established." Similar decisions were given in a host of allied cases. It is hardly profitable to deal with them at length; for they proceed on the same basis. Suffice it that there sprang up an infinite variety of combinations in different branches of trade which had to be dealt with by the American Courts: There was combination of grain dealers,¹ combination of cotton seed oil mills,² combination of blue stone producers,³ combination of druggists,⁴ combination of retail coal-dealers,⁵ combination of milk dealers,⁶ combination of candle-makers,⁷ combination of

¹ *Craft et al v. McConnoughy* (1875) 79 Ill. 346

² *Texas Standard Oil Co. v. Adoue et al* (1892) 83 Tex 650, 19 S.W.R. 274.

³ *Cummings v. Union Bluestone Association et al* (1897) 44 N.Y. Supp.

87.

⁴ *John D. Park and Sons Co. v. National Wholesale Druggists Association et al* (1896) 50 N.Y. Sup. 1064.

⁵ *People v. Sheldon et al* (1893), 139 N.Y. 251, 34 N.E.R. 785.

⁶ *People v. Milk Exchange* (1895) 145 N.Y. 267, 39 N.E.R. 1062.

⁷ *Emery et al v. Ohio Candle Co.* (1890) 47 Ohio St. 320, 24 N.E.R. 660.

buyers of sheep,¹ combination of salt producers,² combination of carbon manufacturers, combination of lumber manufacturers,⁴ combination of wire cloth manufacturers,⁵ combination of tobacco warehouse men,⁶ combination of grocery men,⁷ and so on.⁴

2. *The Trust form of Combination.*

The Standard Oil
Trust.

By a loose phraseology, all combinations of capital are nowadays commonly described as Trusts. In one way this is significant, for it shows, as von Halle observes, that the public has unconsciously recognised that, though different in their form and sometimes in their temporary aims, all these attempts at combinations are but manifestations of one underlying tendency. Yet, for the sake of accuracy, it is necessary clearly to understand that there are combinations of capital which are Trusts, and there are combinations which are not Trusts.

The Trusts represent an effort to evade the force of the decisions above mentioned against simple combinations. Under those decisions neither individuals nor corporations could become parties to agreements, pools, or associations for the control of prices and products. It was, therefore, suggested that the same result might be accomplished by the organisation of constituent corporations in such a manner as only nominally to retain their individuality, but for all practical purposes to attain identity of interests by merging them in a whole, which was called the Trust. This was done, as von Halle points out, in one of three ways.⁹

1. The Trust was established by a transfer of a

¹ *Judd v. Harrington* (1893) 139 N.Y. 105, 34 N.E.R. 790.

² *Central Ohio Salt Co. v. Guthrie* 35 Ohio St. 666.

³ *Pittsburg Carbon Co. v. Mcmillan* (1890) 119 N.Y. 46, 23 N.E.R. 530; affirming 6 N.Y. Supp. 433.

⁴ *Santa Clara Valley Mill and Lumber Co. v. Hayes et al* 76 Cal. 387, 18 Pac. R. 391.

⁵ *Le Witt Wire Cloth Co. v. N.J. Wire Cloth Co.* (1891) 14 N.Y. Supp. 277.

⁶ *Hoffman v. Brooks*, 23 Am. Law Reg. 648.

⁷ *D. and E. Chapin v. Brown Bros et al* (1891), 83 Iowa 1, 6, 48 N.W.R.

1074.

⁸ For a fuller account the reader is referred to Mr. Arthur J. Eddy's elaborate treatise 'The Law of Combination' to which I am much indebted.

⁹ See von Halle's 'Trusts or Industrial Combinations and Coalitions in the United States,' p. 27.

majority of stock of the different companies to certain trustees in whom the control was vested and who issued certificates in exchange.

2. Or, the total amount of all the stocks was transferred to the trustees, who issued the Trust certificates, whilst the former owners kept mortgages to the extent of the valuation of their factories, and perhaps received an additional bond.

3. Or, the property was unconditionally transferred to the trustees in return for the delivery of trust certificates.

An illustration of No. 2 is the Whiskey Trust. Of No. 3 the best illustration is the Standard Oil Trust to be dealt with hereafter. It is obvious that the three classes rest on the same fundamental principle, the variations depending upon the degree of confidence reposed in the trustees by the corporations constituting the Trust. The fundamental principle put forward in justification is the good old principle of *laissez faire* viz.: that every man can do as he pleases with his own; so that if a firm chooses to place its stock in the hands of the trustees, so called, with power to vote it, it should be free to do so. Generally speaking, this is a fairly sound principle. But one has to test its soundness when applied to the law relating to corporations. Corporations are creatures of the law, their existence as well as their rights and liabilities are defined by and derived from the law. It does not do, therefore, to say that, like the individual the corporation is free to do as it chooses. Even the individual can scarcely be said to have the power of doing just as he chooses. For instance, the maxim *Sic utere tuo ut alienam non leadas* imposes a wide restriction on the freedom of action of individuals in various cases. We shall presently see that the combination of two or three corporations in the form of a Trust is open to serious objection on grounds of law and public policy. For as soon as the Trust form is adopted, a constituent corporation seems to lose its individuality and "violates some provision of its charter or some principle of the law of its creation." It is, therefore, not correct to say that just as an individual, if he chooses, can shut up or sell his shop or abandon his occupation, so a corporation whenever it

likes can surrender its franchise, transfer its stock or delegate its duties to a body of trustees.

To form a correct idea of the nature and operations of Trusts it would be worth our while to study one or two concrete instances. Take the case of the Standard Oil Trust.¹ The Trust agreements provided that a corporation should be formed in each of the four states, namely, Ohio, New York, Pennsylvania and New Jersey, that each of the said corporations should be known as the Standard Oil Co. of the particular state in question, that all assets and businesses of the parties to the trust agreements situated in each state should be transferred to the said several Standard Oil Companies in each particular state, and payment made therefor in the stock of the transferee Company, that the said stock should be delivered to nine trustees, and that no stock of any of the said companies should ever be issued except to the trustees to be held subject to the trust specified. In return for the stock so delivered the trustees were to issue certificates of like value to the several stockholders. Complete powers of management in respect of the several companies mentioned was vested in the nine trustees. An action was brought by the State of Ohio against the Standard Oil Company on the ground that it had violated the terms of its franchise by becoming a party to the above agreement which was clearly against public policy. There were, in fact, two trust agreements one of which was supplementary to the other. The principle defence taken was that the Standard Oil Company of Ohio, as a corporation, was not a party to the said agreement. To understand the extent and magnitude of the Trust's operations it would be profitable to glance at the main terms of the Trust agreements. As already observed, there was an original agreement and a supplemental one and the two trust agreements provided as follows:—

1. As soon as practicable corporations shall be formed in each of the following states under the laws thereof, to wit: Ohio, New York, Pennsylvania and

¹ For a graphic and elaborate account of the history and progress of the Standard Oil Co., see Miss Ida M. Tarbell's 'History of the Standard Oil Company' in two volumes. See also Montague's monograph 'The Rise and Progress of the Standard Company.'

New Jersey ; provided, however, that instead of organising a new corporation any existing charter and organization may be used for the purposes when it can advantageously be done.

2. The purposes and powers of said corporation shall be to mine for, produce, manufacture, refine and deal in petroleum and all its products and all the materials used in such business, and transact other business collateral thereto. But other purposes and powers shall be embraced in the several charters, such as shall seem expedient to the parties procuring the charter or, if necessary, to comply with the law the powers aforesaid may be restricted and reduced.

3. At any time hereafter, when it may seem advisable to the trustees herein provided for, similar corporations may be formed in other states and territories.

4. Each of the said corporations shall be known as the Standard Oil Company of—(and here shall follow the name of the state or territory by virtue of the laws of which the said corporation is organized).

5. The capital stock of each of the said corporations shall be fixed at such an amount as may seem necessary and advisable to the parties organizing the same, in view of the purpose to be accomplished.

6. The shares of stock of cash of the said corporations shall be issued only for money, property or assets, equal at a fair valuation to the par value of the stock delivered therefor.

7. All of the property, real and personal, assets and business of each and all of the corporations and limited partnerships mentioned or embraced in class first¹ shall be transferred to and vested in the said several Standard Oil Companies. All of the property, assets and business in, or of, each particular state shall be transferred to and vested in the Standard Oil Company of that particular state, and in order to accomplish such purposes the directors and managers of each and all of the several corporations and limited partnerships mentioned in class first are hereby authorised and directed by the stockholders and mem-

¹ The first class consisted of all the stockholders and members of fourteen named corporations and limited partnerships and such other corporations and partnerships as might join thereafter.

bers thereof (all of them being parties to this agreement) to sell, assign, transfer, convey and make over for the consideration hereinafter mentioned, to the Standard Oil Company or companies of the proper state or states, as soon as the said corporations are organised and ready to receive the same, all the property real and personal, assets and business of the said corporations and limited partnerships. Correct schedules of such property, assets and business shall accompany each transfer.

8. The individuals embraced in class second ¹ of this agreement do each for himself agree, for the consideration hereinafter mentioned, to sell, assign, transfer, convey and set over all the property, real and personal assets and business mentioned and embraced in schedules accompanying such sale and transfer to the Standard Oil Company or Companies, of the proper state or states, as soon as the said corporation are organised and ready to receive the same.

9. The parties embraced in class third ² of this agreement do covenant and agree to assign and transfer all of the stock held by them in the corporations or limited partnerships herein named to the trustees herein provided for, for the consideration and upon the terms hereinafter set forth. It is understood and agreed that the said trustees and their successors may hereafter take the assignment of stocks in the same or similar companies upon the terms herein provided, and that whenever and as often as all the stocks of any corporation or limited partnership are vested in the said trustees, the proper steps may then be taken to have all the money, property, real and personal of such corporation or partnership assigned and conveyed to the Standard Oil Company of the proper state on the terms and in the mode herein set forth, in which event the trustees shall receive stocks of the Standard Oil Companies equal to the value of the money, property and business assigned to be held in place of the

¹ Forty-four individuals, some acting individually as well as in a representative capacity, one estate and one partnership and such other individuals as might thereafter become identified with them, constituted the second class.

² The third class was composed of a portion of stockholders and members of twenty-six named corporations and limited partnerships, and such individual stockholders and members of corporations and limited partnerships as might thereafter become interested in the said agreement.

stocks of the company or companies assigning such property

10. The consideration for the transfer and conveyance of the money, property and business aforesaid to each or any of the Standard Oil Companies shall be stock of the respective Standard Oil Company to which the said transfer or conveyance is made, equal as per value to the appraised value of the money, property and business so transferred. The said stock shall be delivered to the trustees hereinafter provided for, and their successors, and no stock of any of the said companies shall ever be issued except for money, property or business equal at least to the par value of the stock so issued, nor shall any stock be issued by any of the said companies for any purpose, except to the trustees herein provided for, to be held subject to the trusts hereinafter specified. It is understood, however, that this provision is not intended to restrict the purchase, sale and exchange of property by said Standard Oil Companies as fully as they may be authorised to do by their respective charters, provided only that no stock be issued therefor except to the said trustees.

11. The consideration for any stocks delivered to the said trustees as above provided for, as well as for stocks delivered to the said trustees by persons mentioned or included in class third of this agreement shall be the delivery by the said trustees to the persons entitled thereto, of trust certificates hereinafter provided for, equal at par value to the par value of the stocks of the said Standard Oil Companies so received by said trustees and equal to the appraised value of the stocks of other companies or partnerships delivered to the said trustees. The said appraised value shall be determined in a manner agreed upon by the parties in interest and the said trustees. It is understood and agreed, however, that the said trustees may, with any trust funds in their hands in addition to the mode above provided purchase the bonds and stocks of other companies engaged in business similar or collateral to the business of the Standard Oil Companies on such terms and in such mode as they may deem advisable and shall hold the same for the benefit of the owners of said trust certificates and may

sell, assign, transfer and pledge such bonds and stocks whenever they deem it advantageous to the said trust so to do.

The case was heard by the Supreme Court of Ohio¹ and the main questions that came up for decision were the following: (1) Was the agreement constituting the Standard Oil Trust against public policy? (2) Could the Standard Oil Co of Ohio be regarded as not having joined the agreement in its corporate capacity, in other words, could the stockholders of the said company be deemed to have entered into the said agreement as distinguished from the Company itself? (3) Had the Company as such power to become a party to such an agreement? It was held that an agreement by which all, or a majority, of the stockholders of a corporation transfer their stocks to certain trustees, in consideration of the agreement by the stockholders of other companies and of the members of limited partnerships, engaged in the same business, to do likewise; and by which all are to receive, in lieu of their stocks and interests so transferred, trust certificates to be issued by the trustees, equal at par to the par value of the stocks and interests; and by which the trustees are empowered, as apparent owners of the stock, to elect directors of several companies and thereby control their affairs in the interests of the trust so created; and are to receive all dividends declared by the several companies and limited partnerships from which, as a common fund, dividends are to be paid by the trustees to the holders of the trust certificates,—tends to the creation of a monopoly to control production as well as prices, and is against public policy. It was further held that a corporation can be managed only by its duly elected or appointed directors in the interest of its own stockholders and conformably to the purpose for which it was created. “Where all, or a majority, of a corporation’s stockholders do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the cor-

¹ *State v. Standard Oil Co* (1892) Ohio St 137, 30 N E R 279, 15 L R A, 145, 34 Am St. Rep 541.

porate agencies, does affect the property and business of the company in the same manner as if it had been a formal resolution of its board of directors and the act so done is *ultra vires* of the corporation and against public policy, and is done by them in their individual capacity for the purpose of concealing their real purpose and object, the act is regarded as the act of the corporation, and, to prevent the use of corporate power may be challenged as such by the state in a proceeding in *quo warranto*.”¹

North River Sugar
Refining Company.

Let us next consider the case of the North River Sugar Refining Company. This Company was organised as a manufacturing corporation under the law of the state of New York in the year 1865 and continued to carry on its business until the close of the year 1887. In the year 1887 a plan was formed for the organisation of what was called the Sugar Refineries Company to take effect from October of that year. The general object was to bring together the parties and corporations engaged in the manufacture, refining and sale of sugar and to place their affairs under a board of eleven persons, subject to a further increase to the number of thirteen. The North River Sugar Refining Company became a party to the said trust agreement. Thereupon the Attorney General in the name of the people commenced an action,¹ in the nature of a *quo warranto* to have the Company dissolved, its charter vacated, and its corporate existence

¹ The following passage from the same judgment will also repay perusal : “Applying then the principle that a corporation is simply a corporation of natural persons, united in one body under a special denomination, and vested by the policy of the law with the capacity of acting in several respects as an individual, and disregarding the mere fiction of a separate legal entity, since to regard it in an inquiry like the one before us would be subversive of the purpose for which it was invented, is there, upon the analysis of the agreement, room for doubt that the act of all the stockholders, officers and directors of the Company in signing it should be imputed to them as an act done in their capacity as a corporation? We think not, since thereby all the property and business of the Company is, and was intended to be, virtually transferred to the Standard Oil Trust, and is controlled, through its trustees, as effectually as if a formal transfer had been made by the directors of the Company. On a question of this kind, the fact must constantly be kept in view that the metaphysical entity has no thought or will of its own; that every act ascribed to it emanates from and is the act of the individuals personated by it, * * * and, where an act is ascribed to it, it must be understood to be the act of the persons associated as a corporation, and whether done in their capacity as corporators or as individuals, must be determined by the nature and tendency of the act.”

² *People v. North River Sugar Refining Co.* (1889) 5 Ry and Corp Law Jour. 56; 54 Hun, 354; 121 N.Y. 582; 24 N.E.R. 834.

annulled. The grounds set out for such forfeiture are typical and it would be profitable to study them, they were *inter alia* the following: That it was a party to the combination created by the Sugar Refineries Company deed, the said combination being injurious to trade, and, therefore, a criminal conspiracy and an indictable offence; that the combination tended to monopoly, prevention of competition and enhancement of prices, and as such was illegal; that corporate franchises being granted in trust upon condition that they be exercised to the attainment of the object for which they are granted, and that they be not abused to public detriment, any act of a corporation in violation of this grant and these duties forfeits its franchise; that the participation of the North River Sugar Refinery Company in a conspiracy is ground for the forfeiture of its franchise; that the transfer by the North River Sugar Refinery Company of its control to a board not recognised by its charter is a forfeiture of its charter. The Court held that the North River Sugar Refining Co. had entered into an unlawful combination and had thereby subverted its own franchises and rendered itself liable to annulment of its charter. The effect of the combination, it was held, was to bring about a partnership between the parties thereto who would share the profits and losses of the new corporation, but the defendant company had no authority to enter into any partnership agreement, however innocent in itself. "It is well settled that corporations cannot consolidate their funds or form partnerships unless authorised by express grant or necessary implication; nor can they enter into any arrangement amounting to a practical consolidation or copartnership." Lastly, the combination was declared illegal as being in restraint of trade and tending to monopoly. In this connection Judge Barrett said, "The board, under this executed deed, can close every refinery at will; close some and open others; limit the purchase of raw materials (thus jeopardizing and in a considerable degree controlling its production); artificially limit the production of refined sugar; enhance the price to enrich themselves and their associates at the public expense, and depress a fool-hardy rival; in brief, can come as near to

creating an absolute monopoly as is possible under the social, political and economic conditions of to-day. We are told that this cannot be accomplished with regard to an article like sugar, which can be indefinitely produced by the application of capital and labour, and that monopoly is impossible only where the supply of the article is restricted by nature. This position has been maintained in an argument of exceeding brilliancy, which I confess to have enjoyed as one always enjoys a persuasive manner of presentation. But while the argument was most ingenious it was neither sound, nor, I say with respect, plausible. Of course a monopoly in the strict technical and absolute sense cannot be thus created, but a monopoly in a legal sense can. The monopoly with which the law deals is not limited to the strict equivalent of royal grants or people's patents. *Any combination the tendency of which is to prevent competition in its broad and general sense and to control and thus at will enhance prices to the detriment of the public is a legal monopoly.* And this rule is applicable to every monopoly whether the supply be restricted by nature or susceptible of indefinite production. The difficulty of effecting the unlawful purpose may be greater in one case than in the other, but it is never impossible. Nor need it be permanent or complete. It is enough that it may be even temporarily and partially successful."

Other cases of
suppression of
Trusts.

The above two cases of Trust are typical and relate to two of the most successful monopolistic enterprises in the United States. I have, therefore, thought it best to give the gist of the arguments as well as the grounds of decision rather fully. There is no dearth of Trust cases or adverse judgments. Indeed, in every department of industry there was at one time a vigorous attempt to 'trustify' firms; and it was as vigorously met by the courts of justices by ordering forfeiture of franchise on the ground of offending against public policy. Thus the Distillers and Cattle Feeders' Trust,¹ the American Cattle Trust,² the American

¹ See *State v. Nebraska Distilling Co.* (1890) 29 Neb. 700; 46 N.W.R. 155. See also *Distilling and Cattle Feeding Co. v. People* (1895) 156 Ill. 448; 41 N.E.R. 188, where the history of the Trust and of the Distilling and Cattle Feeding Company, which succeeded the Trust, is given at length.

² *Gould v. Head et al* (1889) 38 Fed. R. 886.

Preservers' Trust,¹ the Chicago Gas Trust,² the Cotton Seed Oil Combination³ were one after another declared illegal combinations.

While the courts of justice set their face against the trust form of combinations and while one section of the public was clamouring for more and more stringent measures on the part of the states against Trusts, there was, on the other hand, a powerful and highly thoughtful body of critics who denounced such restrictive legislation in the strongest possible terms. In so far as public opinion, rationally and thoughtfully expressed, gives a clue to the history and philosophy of law, it is deserving of careful consideration. I shall, therefore, endeavour to give one or two specimens of the contrary opinion expressed by unbiassed people. In an interesting article contributed to the Political Science Quarterly (Vol. 3, page 609) Theodore W. Dight discusses the situation regarding the Law of Trusts. It gives us the other side of the picture. After discussing at great length what wonders perfect trade freedom has achieved in the United States the writer observes: "Forty years of legislative experience have taught the people of England that there is nothing to fear from combinations of producers when competition is absolutely free, and that no 'conspiracy against the world' is possible. Let us, therefore, be calm. Trusts, as a rule, are not dangerous. They cannot overcome the law of demand and supply, nor the resistless power of unlimited competition. They are, however, a sign of the times. The right of association is the child of freedom of trade. It is too late to banish it. As mercantile concerns under freedom of trade have tended in our cities to be more and more vast and comprehensive and absorb the smaller ones, so it is reasonable to suppose that the right of

Opposite opinion
denouncing
restrictive legisla-
tion against Trusts

¹ *American Preservers' Trust v. Taylor Manufacturing Co. et al* (1891) 46 Fed. R. 152. See also *Bishop v. American Preservers' Co.* (1895) 157 Ill. 284; 41 N.E.R. 765, where the court observed: "It will thus be seen that the agreement in question makes provision for welding together all the interests engaged in the business named in the agreement into one giant combination or partnership under the absolute dominion and control of a board of nine trustees. Its illegal purpose is apparent upon its face, and, therefore, under the decisions above referred to must be held to be void as being injurious to the public interests."

² *People v. Chicago Gas Trust Co.* (1889) 130 Ill. 268; 22 N.E.R. 798.

³ *Mallory v. Hananer Oil Works* (1889) 86 Fenn. 598; 8 S.W.R. 396.

association will be made more and more available in manufacturing. In fact, the two tendencies are in substance the same. If association is prevented by law, different manufactories may be melted into one. The only way out of the difficulty, if it be one, is to invade the right of property, limit production by law, cut down the employment of large capitals, and perhaps, in the end, hand over production to the state. Are we ready for these things? All English-speaking people,—we of the United States and the English of England—have been engaged for a hundred years both in overcoming natural obstacles to internal trade and in abrogating absurdly restrictive laws. It is not to be credited that we shall commit the supreme folly of resorting to mischievous legislation, fully tried and long since abandoned.”¹

3. *Consolidated Combinations.*

‘Corporate’ or
consolidated com-
binations

We now come to the third class. We have found from the decisions above mentioned that there were legal obstacles in the way of individuals or corporations meeting together and forming associations, alliances and pools; and that the last and most potent method—the one under the form of Trusts—came equally to incur the disapprobation of the courts. The logical outcome of all this was the consolidated combination,² in which the undertakings themselves were fused into one. This was effected by amalgamation of different firms or corporations, by sale of one concern to another, the former being either closed or continued only as a branch of the latter, by lease (a method quite common with railroads), or by the establishment of a new large company, which absorbed in itself all those already existing, assigning to them particular functions, sometimes within areas specifically allotted to them. This represents the final phase of centralisation of industries in America, attempting as it does to effect a complete fusion, financially and otherwise, of all the different undertakings in a particular field of production or enterprise. The argument on which they are sought to be

¹ Quoted in Eddy's ‘Law of Combinations,’ Vol. I. p. 599.

² I have adopted this name for lack of a better one. Eddy in his ‘Law of Combinations’ adopts the name ‘corporate’ for this form.

supported is the time honoured one viz. you cannot deny the right of an individual firm, partnership or company to purchase outright the assets, business and goodwill of any other firm, firms, or corporations engaged in the same department of industry, with a view to extend its operations. The judgments which condemned the 'trust' form of combinations often contain passages which justify the 'consolidated' form. Take, for instance, the following from the judgment of the Court of Appeals of New York in the Sugar Refineries case: "It is said, however, that a consolidation of manufacturing corporations is permitted by the law, and that the trust, or combination, or partnership, however it may be described, amount only to a practical consolidation, which public policy does not forbid, because the statute permits it. The refineries did not avail themselves of that statute. They chose to disregard it, and to reach its practical results without subjection to the prudential restraint with which the state accomplished its permission. *If there had been a consolidation under the statute, one single corporation would have taken the place of the others dissolved. They would have disappeared utterly, and not, as under the trust, remained in apparent existence to threaten and menace the other organisations and occupy the ground which otherwise would be left free. Under the statute, the resultant combination would itself be a corporation deriving its existence from the state, owing duties and obligations to the state, and subject to the control and supervision of the state, and not, as here, an unincorporated board, a colossal and gigantic partnership, having no corporate functions and owing no corporate allegiance. Under the statute, the consolidated taking the place of the separate, corporations could have as capital stock only an amount equal to the fair aggregate value of the rights and franchises of the companies absorbed; and not as here, a capital stock double that value at the outset, and capable of an elastic and irresponsible increase. The difference is very great, and serves further to indicate the inherent illegality of the trust combination.*"¹

¹ (1890) 121 N.Y. 582, 24 N.E.R. 834, 9 L.R.A. 33.

In Richardson v. Buhl et al,¹ however, which was the case of a consolidated combination of match companies the judgment is in quite a different key. The court held that the contract between the parties constituting the combination was void as against public policy "Monopoly," said Sherwood, J., "in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the Government in carrying on a great public enterprise, or public work under governmental control, in the interest of the public. Its tendency is, however, destructive of free institutions and repugnant to the instinct of a free people, and contrary to the whole scope and spirit of the federal constitution, and is not allowed to exist under express provision in several of our state constitutions. Indeed, it is doubtful if free government can long exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations to be used at discretion in controlling the property and business of the country against the interest of the public and that of the people for the personal gain and aggrandizement of a few individuals."

Instances might be multiplied but I do not wish to do so.² Corporate or consolidated combinations came by the same fate as Trusts, and the courts in numerous cases held that an illegal combination could not cloak its objects under the form of a corporation and thus evade the penalties provided by the Anti-Trust Law.

¹ (1889) 77 Mich. 632, 43 N.W.R. 1102, 6 L.R.A. 457.

² The following cases may be referred to: *American Biscuit and Manufacturing Co. v. Klotz* (1891) 44 Fed. R. 721, *Merz Casule Co. v. United States Capsule Co et al* (1895) 67 Fed. R. 414; *Strait et al v National Harrow Co. et al* (1891) 18 N.Y. Supp. 224; *National Harrow Co v. Hinch et al* (1896) 76 Fed. R. 667; *National Harrow Co v. Bement and Sons* (1897) 21 App. Div. 290, *Western Woodenware Association v Starkie et al* (1890) 84 Mich 76, 47 N.W.R. 604; *Olmstead v Distilling and Cattle Feeding Co.* (1895) 73 Fed R 44

LECTURE XII.

CAPITALISTIC MONOPOLIES—(*Cont.*).

“The spirit of monopolists” wrote Gibbon, “is narrow, lazy and oppressive; their work is more costly and less productive than that of independent artists, and the new improvements so easily grasped by the competition of freedom are admitted with slow and sullen reluctance in those proud corporations, above the fear of a rival and below the confession of an error.” Gibbon spoke with reference specially to the corporations of Oxford and Cambridge. The observation applies equally well to monopolies in general. But it seems to be too sweeping a generalisation. Besides, the character of the problem of monopoly has become vastly different at the present day and it is necessary now to form new standards of judgment. For instance, if we turn to the monopolistic combinations of the present day, it is hardly correct to say that their work is more costly or less productive than that of independent artists, that improvements are admitted by them with slow and sullen reluctance, or for that matter, that they are above the fear of a rival. On the contrary, there are admitted economies of a far reaching character effected by production or distribution on a large scale, which are well known to be impossible in the case of independent traders. Improvement in machinery, inventions and appliances form another striking feature of the methods adopted by present day large combinations. The case of the Carnegie Steel Trust is a well-known instance of it. Then as regards their being above the fear of rivalry, statistics show that the small business or the individual producer, like the poor, is always with us. Notwithstanding the prevailing tendency to concentration and combination, the average firm even now is small rather than large; and the large firm be it a ‘trust’ or a ‘corporate combination’—invariably calls forth new competitors, large or small, as soon as its profits are high enough to tempt them into the field. Thus potential competition is always

The good and evil
of monopolies

a real force which the combination has to reckon with.

Let us form our own estimate of the good and evil of monopolies. In order to do so, we must clear the way by removing misconceptions. Just as the word Trust is employed as an omnibus term for carrying all sorts of significations, though, in strictness, it ought to be applied to denote only a species of monopolistic organisation (see Lecture XI, *supra*), so the word Monopoly is also loosely employed to mean all sorts of things. "There are three things," says Prof. Clark,¹ "not at all identical, which the people in their thought and speech jumble together, and even attack without discrimination. They are, first, capital as such; secondly, centralisation; and thirdly, monopoly. When a general attack is pending the word that is used to cover them all, in blanket fashion, is 'monopoly.'" Now it must be remembered that a large aggregation of capital is not necessarily unlawful or against public policy, nor is centralisation of business wrong. It is only when centralisation results in an 'odious monopoly' that it should be branded as an enemy to freedom and progress. Hence it follows that if we can have centralisation without monopoly, we may succeed in securing the productive energy, the savings and the economies that great capitals ensure, in other words, secure the good that is in monopolies, and cast away its evils.²

Now what are the evils of monopoly? We have in the earlier lectures considered these in a general way. We have now to discuss them in a more concrete fashion, with reference to the tactics adopted by combinations specially in America, and also to a certain extent in England and the continent. These tactics have become notorious, and it is by recourse to these that the 'trust,' the 'monopoly,' or the 'combination,' by whatever name you may choose to call it, proceeds literally to kill competition in cold blood. No one doubts that the big company has always the right to beat the small one in the struggle for existence

¹ See Prof. John Bates Clark's book 'The Control of Trust,' p. 6.

² "If America is, as it seems to be, the natural home of the trust and if we can draw the fangs of the monster and tame him to good uses, we can get all that is possible to get out of material civilisation." 'The Control of Trust,' p. 9

and in an honest and straightforward fight for cheapness and efficiency. But when it takes recourse to questionable methods¹ and proceeds to disable its adversary by an underhand blow, there is an end to real rivalry and it offends the spirit of the common law. If an appeal to the common law proves ineffectual, a proper case arises for the legislature to take action and put a stop to the mischief.

One of the underhand methods by which monopolies have proved themselves obnoxious is contriving to obtain preferential rates from railroad companies and shipping companies. In these days the success of any industry or manufacture depends very largely upon its means of transport. In its race for competition its first and foremost qualification is the facility which it commands for cheap and rapid transit of its goods from one place to another, from inland centres to the sea-board, and thence by shipment to other shores. If there were fair field and no favour in regard to this important requisite for success, many an independent producer would be able to carry on a good fight against large capitalistic organisations and thereby keep up a competition which would in the long run prove wholesome not only to the monopolies but to themselves as well. But the grievance of the independent producer is that the great corporations succeed by the length of their purse in effecting unholy alliances with railroad companies, and thus in arming themselves with unfair fighting powers. The history of the three railroad companies which competed for the 'Oil' traffic is full of secret agreements for freight discriminations and rebates as a means of attracting custom. In many cases, the railroad companies became parties to agreements whereby not only were rebates granted on the carriage of standard oil, but 'drawbacks' were given on the oil carried for independent shippers. This method would obviously destroy the independent shippers in no time. The story of the Steel Trust, of the Whiskey Trust, and many another American combine is replete with illustrations of the secret and

Trust tactics.

Freight discriminations.

Rebates and 'Drawbacks'

¹ This is very happily put in one sentence by Prot. Clark in his instructive little book 'The Control of Trusts.' "Monopoly is that monopoly does; and the typical act that identifies the unlawful power is the crushing of rivals by the means above described." See p 73.

Acquisition of rival
works at bargain
prices

underhand manner in which by unlawful alliance with railroad companies, the independent producer was done out of this right to existence. Armed with the advantage of railway discriminations the monopolies proceeded to the acquisition of rival works at bargain prices. One after another the independent traders had either to shut up their works or sell off their concern to the monopolist. A very instructive illustration of this is furnished by the report of Frank Rockefeller (brother of John D. Rockefeller, the Oil Dictator, later of the Standard Oil Trust fame) to the Committee of Congress appointed in 1876¹ who describes the manner in which his brother and other operators induced him to sell off his concern. "If you do not sell your property," said they, "it will be valueless, because we have got advantages with the railroads." ² He was not the only victim, for the same device was adopted for compelling twenty-one out of twenty-six oil refineries in Cleveland to sell their works at prices which were abnormally below value.

Factors' agreement.

There are other ways of unfair dealings. A most notorious method is by what is called 'factors' agreement,' whereby the monopolist may refuse to sell goods to the independent trader. A trust has invariably, among the wide variety of its products, some articles which are essential to a merchant's business. It adopts the device of refusing to sell the merchant any of those articles or refusing to give him the usual discount, if the merchant instead of buying goods from it alone, buys from any competing establishment. This device, therefore, is of the nature of a boycott—a boycott of merchants who do not comply with its regulations and also a boycott of merchants who do not in turn boycott 'independents.'

Price-cutting and
Dumping.

Here is another method often employed: the trust may sell goods at less than cost price with a view to kill the independent trader. Suppose an independent trader or producer is operating in a particular tract of country, which affords special facilities for the commodity in question. He

¹ The Committee was appointed to inquire and report on the ways, and methods of the South Improvement Company. The Committee characterised it 'as a most gigantic and daring conspiracy,' and this brought about its ultimate death. But most of the members of this Company notably Mr. John D. Rockefeller, continued its policy later in the Standard Oil Company.

² Cited in Hirst's 'The Story of Trusts.'

may be in a position to produce the commodity much cheaper than the monopolist can hope to do, other things remaining the same. Under ordinary circumstances, he is an invulnerable opponent. But the monopolist has large capital at his back and freight discriminations that give him an unfair advantage over his adversary. He can afford to stand some loss for a time; the profit he earns by exacting monopoly prices in one area, where he works unopposed, he can well afford to throw away in another area in trying to undersell and exterminate competitors there. This is what he does. Ultimately, the independent producer is beaten out of the market. Then comes the opportunity for the monopolist to dictate his terms afresh to consumers. This method of 'local cutting' of prices or selling of goods within the rivals special territory below the cost of production, is the complement of another method of 'cutting' which is as frequently adopted. The monopolist for instance may make many varieties of one general kind of merchandise while the rival firm may make only one. That being so, the monopolist can well afford to reduce the price of only that variety of goods which the rival producer makes, retaining the other prices at the original high level. This obviously brings about the destruction of the opponent within a short time leaving the field entirely to the monopolist.

The iniquitous methods above described have been very happily described as "the predatory policy of Trusts."¹ To bring back things to anything like the normal condition, this predatory policy must be counteracted by securing fair treatment to all by railroads stopping secret rebates, on the one hand, and 'drawbacks' on the other, and putting an end to 'price cutting' and 'dumping.' Above all, it is essential that the operations of the trusts should be brought out of the darkness of secrecy, in which they are invariably buried, into the light of public knowledge and criticism. The amount of secrecy which is generally indulged in is obviously inconsistent with honesty, integrity and straightforwardness. In 1888 Mr.

¹ The method of reaching customers in different localities with different prices is also known as 'Dumping.'

² Clark's 'Control of Trusts.'

Rockefeller had to give evidence before a Trust investigation undertaken by a Committee of the New York Senate. The manner in which admissions regarding the constitution of the South Improvement Company had to be extracted from him by searching cross-examinations furnishes an instructive illustration of Trust methods of secrecy.

Anti-Trust Legis-
ation in America.

The above brief sketch of Trust methods will enable us to understand better the reason why the courts and the legislature in America have sought to put them down with a firm hand. In the last lecture, I endeavoured to give an idea of the trend of case law on the subject of trusts and combinations. I shall in this lecture give a brief sketch of anti-Trust legislation in America. The movement for consolidation and combination began in America after the year 1860. Business men saw that as individuals they proved powerless against circumstances and they, therefore, tried to meet the exigencies of the situation by associating in 'pools' notably in salt, cordage and whiskey industries. As already observed, these combinations did not meet with recognition from the law. It was the genius of John D. Rockefeller which then suggested the new and the more ingenious method in the shape of Trust formation. The 'Standard' was the first born of the Trusts. Mr. Rockefeller was able to secure special rates of transportation from railway companies, and the 'Oil Dictator' soon found himself in a position to dictate terms to all. The success of the Standard Oil Trust gave an impetus to the whole movement for consolidation and combination of industries. Trusts on pretty much the same lines as the 'Standard' were formed for the manufacture of sugar, whiskey, lead, cotton, oil, linseed oil, starch, etc. Unfair discriminations by railroad companies, unfair manipulation of the stock exchanges which were glutted with huge quantities of Trust stocks, unscrupulous price-cutting and dumping operations, and the gradual extermination of the independent producer or supplier became the order of the day. Public opinion was strong against the Trusts and the people cried out for action on their behalf by the Government and the legislature. In 1877 the first piece of anti-Trust legislation was passed by the con-

stitution of Georgia. It provided as follows: "The General Assembly shall have no power to authorise any corporation to make any contract or agreement whatever with any corporation which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective business, or to encourage monopoly; and all such contracts or agreements shall be illegal or void." This was originally directed against railroad companies but was readily applied to Trusts later on. In 1887 the Inter-State Commerce Act was passed whereby railways engaged in inter-state commerce were forbidden to exercise discrimination between clients in their rates of freight, and all railroad pools and traffic arrangements were declared illegal. An Inter State Commerce Commission was appointed to enforce obedience to the law. "Anti-Trust Laws were passed in 1889 by Kansas, Maine, Michigan, Missouri, Nibrasca, N. Carolina, Tennesse, Texas and the territories of Idaho, Montana and N. Dakota; and the new States of Washington and Wyoming introduced provisions in this direction into their constitutions. In 1890, Anti-Trust Laws were passed by Iowa, Kentucky, Louisiana, Missouri and S. Dakota. In 1890, Kentucky or Missouri introduced provisions into their constitutions. In the same year Alabama, Illinois, Minnesota and the territory of New Mexico; in 1892, New York and Wisconsin legislated to the like effect; while in 1893 California forbade combinations in live stock, Nibrasca in coal and lumber. Amendments to these laws were passed in Missouri and Tennesse in 1891; Louisiana in 1892; Illinois, Minnesota and South Dakota in 1893. The United States Act was passed in 1891 and the Tariff Act of August 1894 makes some general provisions of the same character as to the regulation of prices." ¹ Thus between the year 1887 and 1894 the Federal Government, twenty-two states and one territory had enacted anti-trust laws, emphasising in the main the old principle of common law that contracts in restraint of trade are against public policy and are void. Most important of all was the Sherman Anti-Trust

¹ Von Halle's 'Trusts or Industrial Combinations in the United States' pp. 17-18. See also F. H. Cooke's 'Economic and Anti-Economic Legislation.'

Law of 1890, which declared all combinations in restraint of trade among the several states, or attempts to monopolise such trade, to be misdemeanours punishable by fine or imprisonment. Presently, we find, the law was set in motion either by individuals or by states, through the State Attorney, and some of the more important Trusts were soon dissolved as illegal such as the Oil Trust of Ohio in 1892, and the Sugar Trust of New York in 1890.¹ But if Trusts were illegal, the corporate combinations were not yet. So the Sugar and Whiskey Trusts, after dissolution, adopted the device of forming one large corporation, and thereby evading the reach of the new law which affected more immediately the Trust formations. The new corporation flourished under the same management as the Trust, only the form of it was changed.

Partiality to Trusts
in particular States

At this point a curious phenomenon happened in the history of American combinations. While on the one hand there were strong repressive measures adopted by the states and the Federal Government to put an end to the mischief of monopolistic combinations, on the other hand there was the strange spectacle of certain particular states offering every encouragement to them and affording them a haven of safety from which to carry out their programme of work. The state of New Jersey led the way in this matter. It amended its laws in such a manner as to empower a corporation formed in New Jersey to purchase and own the stock of any corporation in any state. The only formalities insisted upon by New Jersey for this purpose was the payment of a small fee and an annual tax, the maintenance of a head office in New Jersey and the publication of an annual report. The effect of this was that, by having a small office in New Jersey town, a corporation was able to operate in all other states and thus run a chariot-and-four through the anti-Trust laws of those states. The corporations could scarcely have asked for anything simpler for carrying out their operation. New Jersey soon became the "Mecca of irresponsible corporations." With the inrush of corporations, its revenue went up, and other states could scarcely resist the temptation of following

¹ Ibid.

its example. Presently, Delaware, Illinois, West Virginia, Maine and other states amended their laws for the purpose of sheltering corporations and reaping the income to be made by such means. The Industrial Commission which carried on its elaborate investigation from 1899 to 1902 made a report recommending national supervision of Trusts and compulsory publication of their accounts and operations. But the Federal Government could not interfere, for corporation law lay outside its sphere and was "a jealously guarded state right," while the states recklessly went on harbouring the worst corporations, and encouraging their evil practices. Thus the constitutional difficulty between the states and the Republic was largely responsible for the apparent anomaly which prevailed for a long time—the anomaly of legislation repressing monopolies in some states and legislation fostering them in others.

But the evil day could no longer be put off. Corporations went on extending their operations among several states and into foreign countries, relentlessly checking competition everywhere. Hence came what is known as the Federal Anti-Trust Act of 1890, ^{The Sherman Act 1890} otherwise called the Sherman Act or the Anti-Trust Act.¹ It is entitled "An Act to protect trade and commerce against unlawful restraints and monopolies." The first three sections of it, which contain the most important portion of the legislation are as follows:—

Sec. 1. Every contract, combination in the form of Trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in such combination or conspiracy, shall be deemed guilty of a misdemeanour, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolise, or attempt to monopolise, or combine or conspire with

¹ Act of July 2, 1890, C. 247 (26 Stat. L. 209).

any other person or persons to monopolise any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanour, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court.

Sec. 3: Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States, or of the districts of Columbia, or in restraint of trade or commerce between any such territory or territories and any state or states or the district of Columbia or with foreign nations, or between the district or Columbia and any state or states or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any combination or conspiracy, shall be deemed guilty of a misdemeanour, and on conviction thereof shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The exact scope of the Act.

It will be noticed that the title describes the Act as one to protect trade and commerce against "unlawful restraints and monopolies." The body of the Act, however, nowhere uses the term 'unlawful,' but embraces every contract in restraint of trade or commerce. The question, therefore, arises what would be the proper construction of the statute where restraints are sought to be justified on the ground of being reasonable. In the case of *United States v. Trans-Missouri Freight Association*¹ the Supreme Court of the United States held that the Act embraces every contract in restraint of trade or commerce, whether reasonable or unreasonable, whether legal or illegal. "It is now with much amplification or argument urged that the statute, in declaring illegal, every combination in the form of trust or otherwise, or conspiracy in restraint of trade and commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in unreasonable restraint of trade, while leaving all

¹ (1896) 166., U.S. 290, 17 Sup. C. F. R. 540

others unaffected by the provisions of the Act; that the common law meaning of the term 'contract in restraint of trade' includes only such contracts as are in unreasonable restraint of trade, and that when the term is used in the federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof. The term is not of such limited signification. Contracts in restraint of trade have been known and spoken of for hundreds of years, both in England and this country, and the term includes all kinds of all contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade and would be so described either at common law or elsewhere. By the simple use of the term 'contract in restraint of trade' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an Act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the Act that which has been omitted by Congress."

From the above it seems to follow at first blush that the Act really embraces every contract in restraint of trade. In fact, however, it does not, and that for two reasons: first, the supreme court in the same case held that the Act does not embrace a very large class of contracts which fall within the strict definition of the phrase "contracts in restraint of trade." Referring to contracts entered into in connection with the sale of property or of property right such as a business, a practice, or an industry, contracts, that is, in which the seller bound himself to refrain from competing with

Does it embrace all contracts in restraint of trade?

the purchaser, the court observed: "A contract which is the mere accompaniment of the sale of the property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included within the letter or spirit of the statute in question." It is, therefore, clear that a large class of contracts at present ordinarily understood as contracts in restraints of trade goes out of the scope and operation of the Act. Secondly, the Act covers only such contracts, restraints and monopolies as affect trade or commerce with foreign nations or among the states, or with the Indian tribes. Here is the special limitation of the scope of the Act. Thus it leaves outside of its operation nearly all those contracts or agreements which are ordinarily understood by the lawyer as contracts in restraint of trade and which we had occasion to discuss in a previous lecture. The primary purpose of the Act was to suppress commercial and industrial trusts and combinations, and in so far as the direct object of any such trust or combination was the restriction or control of inter-state or foreign commerce such trust or combination came clearly within the purview of the Act.

Combinations of competing railroads—whether outside the scope of the Act.

The case above mentioned¹ was one in which several points came up for decision. Among other things, it was contended that the Act in question was not directed to the combinations of competing railroads to keep up their prices to a reasonable sum. Eighteen competing railway companies had formed the Trans-Missouri Freight Association and, as members thereof, had entered into an agreement giving the association control of all competitive traffic within a designated and combined territory, appointing a board consisting of several persons, one from each of the railway companies and conferring upon such association the power to establish and maintain rules, regulations and rates on all competitive traffic and to punish by fine such members as failed to live up to established schedules. In 1892, a bill was filed by the Government against the Association and its members, praying that the contract be

¹ *United States v. Trans-Missouri Freight Association et al* (1896) 166 U.S. 290.

declared illegal under the Anti-Trust Act of 1890, that the association be dissolved, that the defendants be prohibited from further agreeing and acting together in maintaining the rules and regulations for carrying freights, etc., that they be restrained from continuing to monopolise or attempting to monopolise freight and traffic in the different states and territories of the United States. The defence, *inter alia*, was that they had the right under the Inter-State Commerce Act to combine and agree for the purpose of establishing and maintaining reasonable uniform rates. The court held that the Act in question did apply to combinations of the kind complained against. The judgment gives a brief history of the times relating to the growth of corporations. I, therefore, make no apology for giving the following extracts from it. "It is said that Congress had very different matters in view and very different objects to accomplish in the passage of the Act in question; that a number of combinations in the form of trusts and conspiracies in restraint of trade were to be found throughout the country, and that it was impossible for the State Government to successfully cope with them because of their commercial character and of their business extension through the different states of the Union. Among these trusts it was said in Congress were the Beef Trust, the Standard Oil Trust, the Steel Trust, the Barbed Fence Wire Trust, the Sugar Trust, the Cordage Trust, the Cotton Seed Oil Trust, the Whisky Trust, and many others, and these trusts, it was stated, had assumed an importance and had acquired a power which were dangerous to the whole country, and that their existence was directly antagonistic to its peace and prosperity. To combinations and conspiracies of this kind it is contended that the Act in question was directed and not to the combinations of competing railroads to keep up their prices to a reasonable sum for the transportation of persons and property. It is true that many and various trusts were in existence at the time of the passage of the Act, and it was probably sought to cover them by the provisions of the Act. Many of them had rendered themselves offensive by the manner in which they exercised the great power that combined capital gave

them. But a further investigation of the history of the times, shows also that those trusts were not the only associations controlling a great combination of capital which had caused complaint at the manner in which their business was conducted. There were many and loud complaints from some portions of the public regarding the railroads and the prices they were charging for the service they rendered, and it was alleged that the prices for the transportation of persons and articles of commerce were unduly and improperly enhanced by combination among the different roads. Whether these complaints were well or ill founded we do not presume at this time and under these circumstances to determine or to discuss. It is simply for the purpose of answering the statement that it was only to trusts of the nature above set forth that this legislation was directed that the subject of the opinions of the people in regard to the action of the railroad companies in this particular is referred to. A reference to this history of the times does not, as we think, furnish us with any strong reason for believing that it was only trusts that were in the minds of the members of Congress and that railroads and their manner of doing business was wholly excluded therefrom."

Another important ruling was given at this period in the case of the *United States v. E. C. Knight & Co. et al.*¹ The facts in that case were as follows:—The American Sugar Refining Company was incorporated under the laws of the state of New Jersey for the purpose of manufacture and sale of sugar, molasses, etc. The Knight Company was incorporated under the laws of the state of Pennsylvania for substantially the same business and was engaged in that business in the city of Philadelphia. There were three other Pennsylvania corporations, viz. the Franklin Sugar Refining Co., the Spreckles Sugar Refinery and the Delaware Sugar House, all carrying on business in the same line in Pennsylvania. Prior to 1892, the American Sugar Refining Co. had obtained control of practically all the Sugar Refineries in the United States with the exception of the four Pennsylvania Companies above

¹ 156 U.S. I. 39 L. Ed. 325 ; Pa. 1895.

mentioned. With a view to secure complete control (about 98 per cent) of the sugar industry in the United States, the American Sugar Refining Co. entered into negotiations whereby it secured the control of the capital stock of the above four corporations. A bill was filed charging that the said companies had combined and conspired to restrain the trade and commerce in refined sugar in the several states and with foreign nations contrary to the Act of Congress (the Sherman Act) of 1890. It was held that the mere business of manufacturing was not 'inter-state commerce'; that the manufacture of an article has only an indirect and secondary effect upon commerce¹ and is, therefore a matter for state control and regulation; that "the fact that an article is manufactured for export to another state does not of itself make it an article of inter-state commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce"; that only direct restraints upon inter-state commerce were covered by the Federal Anti-Trust Law; and, finally, that the said law conferred no jurisdiction upon courts of the United States over contracts entered into for the purpose of creating a monopoly relating to property situated within different states, but which did not constitute inter-state commerce. For a time, it was believed that this decision stultified the 'Sherman' law. But then followed the case of the *Addyston Pipe and Steel Co. v. United States* which was less favourable to the monopolist. In that case² six formerly competing firms which supplied the market of thirty-six states with cast-iron gas and water pipes formed a combination whereby they agreed that there should be no competition between them; and the various states specified in the agreement were apportioned among the six companies, each company being given practically the control of the territory assigned to it.

Manufacturing business—is it 'inter-state commerce'?

Addyston Pipe and Steel Co. v. United States.

¹ "Contracts, combinations or corporations to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade; but the restraint would be an indirect result, however inevitable, and whatever its extent, and such result would not necessarily determine the object of the contract, combination or conspiracy."

² 175 U.S. 211; 41 L. Ed. 139; Tenn 1899

They further agreed that in making bids for public contracts they should not compete, but that they should allot each job to a particular member of the 'ring,' whereupon it should make the bid accordingly, and the other members should not put in higher bids, thereby allowing the chosen firm to obtain the contract. It was held that such agreement was in direct restraint of inter-state trade and commerce and illegal under the Federal Act of 1890. The decision of the supreme court in this case is of very great moment in as much as it settled many questions which demanded immediate solution; among others, the following :—

1. Under the commerce clause of the Federal Constitution, Congress has power to prohibit making or performing of private contracts having inter-state or foreign commerce for their object and which result in a direct substantial obstruction to or regulation of that commerce.

2. Any substantial regulation of inter-state or foreign commerce by any other power than that of Congress, after Congress has itself acted thereon, even though such regulation effected by means of private contracts between individuals or corporations, is illegal.

3. Any agreement or combination which directly operates not alone upon the manufacture, but upon the sale transportation and delivery of an article of inter-state commerce by preventing or restricting its sale, etc., thereby regulates inter-state commerce to that extent and to the same extent trenches upon the power of the national legislature and violates the statutes.¹

4. When the necessary, direct and immediate effect of a contract is to violate an act of Congress and also to restrain and regulate inter-state and foreign commerce, whether the design so to regulate was, or was not, in existence when the contract was entered into, is immaterial.

5. Inter-state commerce consists of intercourse and the traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of

¹ C.F. the ruling in *U.S. v. E.C. Knight & Co.* supra

public waters for the purpose, but also the purchase, sale and exchange of commodities.

6. A sale of an article for delivery beyond a state makes the transaction a part of inter-state commerce.

7. Where the contract is for the sale of the article and for its delivery in another state, the transaction is one of inter-state commerce, although the vendor may have also agreed to manufacture it in order to fulfil his contract of sale.

8. Whether or not a combination is in restraint of an inter-state trade is to be tested by its effect in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, taking into consideration all the facts and circumstances.

9. Where a direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties of the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity even though contracts to buy such commodity at the enhanced price are continually being made.

10. Any combination among dealers in a commodity, which, in its direct and immediate effect, forecloses all competition and enhances the purchased price for which such commodity would otherwise be delivered at its destination in another state, is in restraint of trade or commerce among the states, although the article to be transported and delivered in another state is still taxable at its place of manufacture.

11. It is no defence to the charge of being a monopoly that prices are only partially affected and that there is only an incomplete monopoly, it being sufficient to annul a contract or combination *if it really tends to being a monopoly* and to deprive the public of advantages derived from free competition.

12. Combinations or agreements, in so far as they relate to trade or commerce solely within a state, are not within the Sherman Anti-Trust Law.

13. Where a combination or agreement relates to

both state and inter-state commerce, Federal courts under the Sherman Act have no jurisdiction over that part of the combination or agreement which concerns commerce wholly within the state.¹

The device of
forming 'holding'
companies.

A new device for combination was brought to light in the case of the Northern Securities Company. The shareholders of two competing railroads—the Northern Pacific and the Great Northern—formed a third or 'holding' company, namely, the Northern Securities Co. to hold the stock and to control both lines. The arrangement made the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both for the benefit of the former stockholders of each and by vesting the selection of the directors and officers of each system in a common body, to wit, the holding corporation. The holding corporation was to have not only the power but the duty to pursue a policy whereby "all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the inter-state and foreign commerce, formerly carried on by the two systems as independent competitors, established." It was found as a fact that the incorporation of the 'holding company' was not a *bona fide* purchase of the stock of the constituent companies, but was organised to accomplish a pooling of profit of these companies; and it was held that the scheme or device came fully within the purview of the Sherman Act. It was further held that the New Jersey charter was no protection, since it could be granted only for 'any lawful purpose.' This decision applies to railroads, but it was obviously capable of application to other monopolies, and during President Taft's term of office the Standard Oil and the Tobacco Trusts were dissolved by the court on suit by the Government, as being both holding corporations and manufacturing monopolies. In 1912, the Bath Tub Trust came by the same fate, it being declared by the courts to be a mere device for attaining monopoly in the enamelled ware trade. In 1913, the principal officials of the National Cash Register Company were sentenced to varying terms of imprisonment for at-

Covered by the
Sherman Act.

¹ See Lawson's Monopoly and Trade-Restraint Cases, Vol. I, pp. 3-5.

tempting monopoly and practising unfair methods of competition. About the same time, proceedings were initiated against the United Shoe Manufacturing Company, the Sugar Trust and the Steel Trust. Having regard to the number of proceedings had in the United States of late for the dissolution of monopolistic combinations—popularly called ‘trust busting’—one would be inclined to think that they would soon become a thing of the past. But we are as far from it as ever. I have already indicated the industrial conditions which have brought the monopolistic combinations into being. When one studies those conditions carefully, the only conclusion one can come to is that they have come to stay. Many are the remedies that have been suggested, amongst others, the socialistic scheme of state control of all industries. It is hardly possible in these lectures to discuss the merits and demerits of the various schemes suggested. But it can scarcely admit of any doubt that the most practical and expeditious method of curing monopolistic combinations of some of their worst qualities and of making them serviceable to society is by securing greater publicity of their ways of management and accounts, under compulsion of law.

In England the movement for combination has made itself felt in many industries, notably the iron and steel industries, the chemical industries, the textile trade, the transport trade and the tobacco and liquor trades. But Trusts, in the technical American sense, are unknown in England. The peculiar conditions of that type of monopoly formation are not present in England. Except coal, there is scarcely in Great Britain that concentration of raw material in defined areas which has furnished such rare opportunities for monopolistic enterprises in America. The tariff is another potent factor which is conspicuous by its absence. Most important of all, the law of England has been almost friendly to consolidation of companies. The result is that in England one scarcely comes across a combination desperately trying to escape from the cognisance of the law, as in the United States. Perhaps the most notable case of a successful combination in Great Britain is that in sewing cotton. But the questionable practices attributable to the

Movement for
Combination in
England.

Standard have never been alleged against J. and P. Coats. The shipping trade shows a marked tendency of late to consolidation. The amalgamation of the Ellerman Lines, Ltd., with Messrs. Thomas Wilson, Sons & Co., of Hull, further emphasises the tendency to combination in the shipping world which has resulted in the P. & O. Company joining forces with the British India Company and the New Zealand Company, and in the fusion of the fleets of Messrs. Alfred Holt and Company and the India Line formerly owned by Messrs. T. B. Royden. By the P. & O. Company's move the honour of possessing the largest shipping combinations reverted from Germany to England, the Hamburg-Amerika taking second place. That powerful organisation and its sister the Norddeutsche Lloyd are now followed for the fourth place in the list by the Ellerman combined with its fleet of approximately two hundred large vessels. The tendency to larger groupings of vessels under the same management, as towards the standardisation of construction, has received a strong impetus from the war with its merciless destruction of tonnage and wholesale appropriation of vessels for Government use.

Tendency of the courts to favour associations or combinations.

The tendency of the courts¹ in England has all along been favourable to associations of traders and manufacturers. In the *Moghul Steamship Co. v. McGregor and others*² already referred to, the defendants were a 'conference' or combination of shipping companies which had tried to exclude the plaintiffs from the Hankow Tea Trade by offering a special rebate to shippers who confined their shipments exclusively to the conference lines. Damages were sought for a conspiracy to injure the plaintiffs, and it was pleaded that the conference was unlawful, being in restraint of trade. Judgment was given unanimously by the House of Lords against the plaintiffs, the *Moghul Co.* "There are two senses," said the Court, "in which the word 'unlawful' is not uncommonly, though, I think, somewhat inaccurately used. There are some contracts to which the law will not give effect, and therefore, although the parties may enter into

¹ See Lecture XI, *supra*.

² (1892) A.C. 25

what, but for elements which the law condemns, would be perfect contracts, the law would not allow them to operate as contract notwithstanding that, in point of form, the parties have agreed. Some such contracts may be void on the ground of immorality; some on the ground that they are contrary to public policy; as, for example, in restraint of trade, the contracts so tainted the law will not lend its aid to enforce. It treats them as if they had not been made at all. But the more accurate use of the word 'unlawful' which would bring the contract within the qualification which I have quoted from the judgment of the Exchequer Chamber, namely, as contrary to law, is not applicable to such contracts. It has never been held that a contract in restraint of trade is contrary to law in the sense that I have indicated. A judge in very early times expressed great indignation at such a contract; and Mr. Justice Crompton undoubtedly did say (in a case where such an observation was wholly unnecessary to the decision, and, therefore, manifestly *obiter*) that the parties to a contract in restraint of trade would be indictable. I am unable to assent to that dictum. It is opposed to the whole current of authority; it was dissented from by Lord Campbell and Chief Justice Erle, and found no support when the case, in which it was said, came to the Exchequer Chamber, and it seems to me contrary to principle." Lord Justice Bowen said, "To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection." . . . Again, "They (the defendants) have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their trade." Finally, to quote Lord Justice Fry: "To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the courts." These oft-quoted opinions, delivered by eminent judges in the course of the Moghul Case make clear the legal position of competitive traders. Prices can be fixed as high or low as the maker of the articles pleases. Competition, how-

ever violent, is not "contrary to public policy," even if the stronger party carries on business at a loss for a time in order to drive the weaker out of business.

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